

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
APPENDIX**



76-7503

---

United States Court of Appeals  
FOR THE SECOND CIRCUIT

*B*  
DOCKET NO. 76-7503

---

UNITED SERVICES AUTOMOBILE ASSOCIATION AND  
DAVID G. HUMPHREY

*Plaintiffs - Appellants*

*v.*

GLENS FALLS INSURANCE COMPANY

*Defendant - Appellee*

---

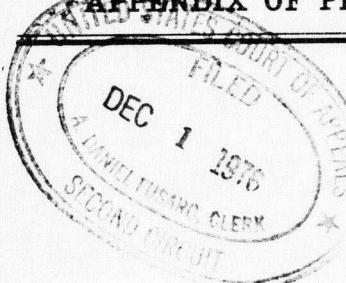
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF CONNECTICUT

HONORABLE T. EMMET CLARIE, *Chief Judge*

---

APPENDIX OF PLAINTIFFS-APPELLANTS

---



WILLIAM R. MOLLER  
WESLEY W. HORTON  
REGNIER, MOLLER & TAYLOR

*Attorneys for Appellants*  
41 Lewis Street  
Hartford, Connecticut 06103

---

**PAGINATION AS IN ORIGINAL COPY**

## TABLE OF CONTENTS

<i>Item</i>	<i>Page</i>
Relevant Docket Entries .....	ii
Memorandum of Decision and Findings of Fact .....	1a
Judgment .....	23a
Excerpts from Plaintiffs' Proposed Findings of Fact	24a
Excerpts from Requests for Admission and Answer to Interrogatory .....	28a
Exhibits .....	29a, 130a
Transcript [excerpts] .....	59a

## RELEVANT DOCKET ENTRIES

1971

10/26 Complaint filed. Summons issued and together with copies of same and of complaint, handed to the Marshal for service.

11/ 8 Marshal's return showing service. Filed — Summons and complaint.

1972

11/30 Defendant's motion to dismiss is denied. Zampano, J.

1975

10/31 Court trial commences at Hartford.

1976

3/18 Court trial concludes.

9/ 8 Memorandum of Decision, filed and entered. Judgment may enter on all issues for the defendant against both plaintiffs.

9/13 Judgment, filed and entered.

10/ 4 Notice of appeal and bond for costs filed by plaintiffs.

## MEMORANDUM OF DECISION

This suit had its origin in a state court automobile liability action<sup>1</sup> in which two insurance companies disputed which of them was primarily liable for insurance coverage on the accident. The plaintiff-carrier, United Services Automobile Association (United Services), in its amended complaint<sup>2</sup> claims that not only was the defendant, Glens Falls Insurance Company (Glens Falls), the primary carrier, but even if the Court found otherwise, the defendant's counsel, by not filing a timely reservation of rights in behalf of his client at the time of his appearance in the state court action, had waived the defendant's right to later refuse to accept liability. Furthermore, even though such a reservation of rights notice was sent by the defendant seven and one-half months later, the defendant's counsel continued his representation of the plaintiff, David G. Humphrey, for approximately five years, before actually withdrawing from the suit, and it is claimed that this conduct on the part of Glens Falls' counsel constituted a waiver of any claim of right it might have had to deny coverage under the policy.

The plaintiff's insured, Humphrey, joined with United Services as a co-plaintiff in this action claiming that the defendant insurer, Glens Falls, was guilty of ordinary negligence and wanton negligence, in its failure to properly defend the action and avail itself of favorable settlement opportunities accessible before trial. It is claimed that this deprived the plaintiff Humphrey of the quality of representation he was entitled to expect under the policy, and had he received proper representation, it might have permitted him to avoid additional trial expenses and the mental anguish which he experienced, from the ordeal of a trial.

---

<sup>1</sup> *Jerz v. Humphrey*, 160 Conn. 219 (1971).

<sup>2</sup> On the first day of the trial, October 21, 1975, the plaintiff, United Services, moved to amend the complaint. The defendant resisted, claiming that a new issue had been injected into the trial. (Tr. 59-65). The amendment was granted and the case continued to March 16, 17, and 18, 1976.

The plaintiff insurer seeks to recover special damages, including the amount of the state court judgment, \$42,000, together with interest, costs, and attorney's fees totaling \$66,560.67. The individual plaintiff Humphrey also asks for special damages for his lost wages and expenses as a witness at the state court trial, plus general damages for his mental anguish. The Court, after a full trial on the merits, finds all the material issues in favor of the defendant and enters judgment accordingly.

### Facts

On February 13, 1962, the day of the accident, the plaintiff Humphrey was operating a Volkswagen automobile owned by his friend, Albert Keith Pierce. The factual circumstances under which he was driving the Pierce car that day are crucial to a consideration of the issue, as to who held the primary responsibility for the insurance liability coverage.

Prior to the day in question, Pierce owned a 1953 Volkswagen, which was insured for liability coverage by Glens Falls under Policy No. 35549, in the amount of \$25,000. On or about January 24, 1962, he purchased a second Volkswagen and transferred through the State Department of Motor Vehicles the registration from the old 1953 vehicle to the newly acquired vehicle. Subsequently, on or about February 3, 1962, Pierce agreed to let Humphrey sell the 1953 Volkswagen and anything he received over \$235.00 would belong to him. He drove the car down to Humphrey's home in Guilford, where he removed the registration plates and told Humphrey that the vehicle was unregistered and uninsured and could only be operated on the private way adjoining the latter's home property. It was made clear that the uninsured, unregistered vehicle could not be operated on any public highway.

At that same time, Humphrey owned a 1955 Volkswagen Micro-bus, which was insured in his name under a \$100,000

liability policy with the plaintiff insurance company, United Services, under Policy No. N-190004-04. On the day of the accident, Humphrey tried to start his own Micro-bus to go to his place of employment, but it would not start. Thereupon, he illegally removed the registration plates from the "bus" and attached them to the unregistered Pierce vehicle and drove the Pierce car to his place of employment. It was about 5:30 p.m. that day, while on the way home from his job, that the accident happened. United Services immediately provided Humphrey with legal counsel for the defense of the motor vehicle criminal charges preferred against him; however, when the civil action was brought, it refrained from instructing its counsel to appear for its insured Humphrey, claiming that Glens Falls had the primary coverage and should assume its obligation to defend and also pay any hospitalization claims.

The injured pedestrian, Edward Jerz, commenced an action in the Connecticut Superior Court on June 4, 1962, claiming \$100,000 damages, wherein he named both Humphrey and Pierce as co-defendants. His complaint not only alleged that Humphrey was operating Pierce's motor vehicle when it struck him, but that he was operating it at that time, as the servant and agent of Pierce and in furtherance of the latter's business and with his consent, knowledge and permission. Counsel for the defendant Glens Falls advised his client that in light of the agency claims asserted in the complaint, it was obligated under Connecticut law, *Missionaries of Co. of Mary, Inc. v. Aetna Casualty & Surety Co.*, 155 Conn. 104, 203 A.2d 21 (1967), to provide Humphrey with a defense, even though its own investigation indicated that no such permission or agency existed authorizing Humphrey to operate Pierce's car on a public highway. (Plaintiffs' Exhibit 68).

Glens Falls' counsel, Pouzzner and Hadden, filed an appearance for Pierce on July 17, 1962, and an appearance for Humphrey on August 10, 1962. When the law firm did so,

on August 8, 1962, they had already advised Glens Falls they expected the Company to send a "reservation of rights letter" to Humphrey. (Plaintiffs' Exhibit 65). However, such a letter was not in fact given to Humphrey until approximately seven and one-half months later. United Services did not authorize its counsel to appear for Humphrey notwithstanding the fact that it knew the ad damnum clause in the pending complaint claimed \$100,000 damages and Glens Falls, even if liable, held a maximum liability coverage of only \$25,000 for bodily injury and \$1,000 for medical payments.

As the state action progressed toward trial, a pre-trial hearing was held in chambers with the presiding judge. The state court file discloses (Plaintiffs' Exhibit 45) that on January 16, 1968, the plaintiffs' settlement demand was \$37,500, but no settlement offer was made, because Glens Falls denied coverage and appeared under a reservation of rights.

The record further discloses that the pre-trial judge's recommendation of settlement of the case at that time was \$30,000. United Services, the plaintiff insurer, did not instruct its counsel to file an appearance, nor did it take any active part in the law suit, other than to request Glens Falls' counsel to keep them advised of developments in the case. It did instruct its counsel to review the court file from time to time and keep abreast of the case's progress through the court. Glens Falls' counsel wrote to Humphrey on September 4, 1968, to acquaint him with the fact that other legal procedures were available to him to protect against loss, because of any judgment which might be recorded against him (Plaintiffs' Exhibit 45), but that their firm had not been retained to do this.

At that point in the state case, a most unexpected event occurred, which caused this suit to become a unique action. The plaintiff Jerz on October 3, 1968, moved for permission

to drop Pierce as a party defendant altogether; and to file an amended complaint solely against defendant Humphrey, United Services' insured. The motion was granted by the court and a substituted complaint was filed, which omitted all reference to Pierce's ownership of the vehicle. The amended complaint also made no claim that Humphrey was operating the vehicle with Pierce's permission or that he was doing so as the latter's agent or in furtherance of his business. A consent withdrawal of the action against Pierce only was filed and Glens Falls' counsel then moved for permission to withdraw from the case. After due notice was given to Humphrey by registered mail (Plaintiffs' Exhibit 45) and a hearing held on the merits, the court granted the motion on November 8, 1968, and this was consummated on November 20, 1968.

Thereupon on January 8, 1969, United Services instructed its counsel to appear in the case for its insured Humphrey and this was done. On July 3, 1969, the latter counsel sought to implead Glens Falls as a third party defendant, claiming that their refusal to provide a defense was wrongful and that they should be held liable for any judgment as well as the costs and expenses of defending the case. However, after a hearing, the state court denied the motion.

The state court case proceeded to trial before a jury and a verdict of \$42,000 damages was entered against Humphrey. An additur was then ordered by the presiding judge to make a total plaintiff's judgment of \$65,000. The Supreme Court thereafter reversed the additur and ordered the reinstatement of the original verdict. (160 Conn. 219).

Under this unique set of circumstances, the plaintiffs now seek to recover over against Glens Falls, for the amount of the state court judgment, plus costs, attorney's fees and interest paid on behalf of Humphrey in the Jerz case, totaling \$55,227.89, plus interest on \$45,747.65 from May 3, 1971 to May 25, 1971 and interest on \$55,227.89 from May 26, 1971 to the present date.

### Issues

1. Was the plaintiff Humphrey operating the Pierce car with Pierce's permission on February 13, 1962, when he was driving the vehicle on the public highway to and from his place of employment.
2. Did Glens Falls' initial defense of the suit without filing simultaneously a reservation of rights, and its subsequent withdrawal after the complaint was amended, waive its right to deny liability coverage to Humphrey and thus become liable to United Services for reimbursement.

### Jurisdiction

While plaintiff Humphrey is a citizen of Maryland, United Services Automobile Association is a Texas corporation and Glens Falls is a New York corporation; both of the latter corporations have their principal offices and places of business outside Connecticut. Diversity jurisdiction exists and the amount in controversy is properly within the jurisdiction of this Court. 28 U.S.C. § 1332.

Connecticut contract law controls the validity and construction of the insurance policies issued to Humphrey and Pierce, respectively. Both were residents of this state, when they acquired the coverage intended to insure the vehicles owned and registered to each of them within the state. The primary operative effect and performance of the respective contracts was intended at the time to be within the state.

"The general rule is that the validity and construction of a contract are determined by the law of the place where the contract was made. But if the contract is to have its operative effect or place of performance in a jurisdiction other than the place where it was entered into, our rule is that the law of the place of operative effect or performance governs its validity and construction." *Jenkins v. Indemnity Ins. Co.*, 152 Conn. 249, 253 (1964).

### Discussion of the Law

When Humphrey illegally put the registration plates of his Volkswagen Micro-bus on Pierce's car without authority on the morning of February 13, 1962, he not only committed an illegal act under state law, but he used the car to travel on the public highway to his place of employment without Pierce's permission. Pierce made it very clear to him when he left the vehicle at Humphrey's house, and entrusted him with the car and the keys, that the car was unregistered and uninsured and was not to be used off of the private area surrounding Humphrey's home. (Tr. 226, 221-222).

The Glens Falls policy (Plaintiffs' Exhibit 1) provides under Part I, Coverage C:

"Persons Insured: The following are insureds under the Liability and Medical Expense Coverages:

- (a) with respect to an owned automobile,
  - (1) the named insured,
  - (2) any other person using such automobile to whom the named insured has given permission, provided the use is within the scope of such permission."

Humphrey's operation of Pierce's vehicle was while carrying out a clear mission of his own; it was not within the scope of any permission granted by Pierce. Hence it could not have been within the scope of the Glens Falls' coverage provisions, as hereinbefore quoted under the terms of the policy. His use of the car that day was for his own personal convenience in getting to and from his place of employment; he was on an errand of his own. Had he a prospective purchaser at the plant where he worked and to whom he proposed to demonstrate the car, that might at least have created colorable and arguable circumstances. However, Humphrey admitted that this was not the case.

Under similar circumstances where an employee had limited permission to drive his employer's vehicle during

business hours, and he drove it on a mission of his own after work, the Connecticut Supreme Court denied coverage. *Mycek v. Hartford Accident & Indemnity Co.*, 128 Conn. 141, 145-146 (1941). There the court stated that:

“. . . [O]ther authorities relied on by the plaintiff. . . hold that if permission is once granted, the user is an additional insured regardless of the limits of the permission or the degree to which those limits have been violated. For the reasons stated, we do not agree with this doctrine and hold that [the plaintiff] was not an additional assured because he was not driving the car with the permission of the named assured.”

The present case does not present the problem of deviation from a permitted use, as in the case of *Dickinson v. Maryland Casualty Co.*, 101 Conn. 369 (1924), because the use made of the Pierce car was never, even in its inception, authorized or permitted. Humphrey in using the vehicle violated the criminal motor vehicle law by unlawfully transferring his registration plates and operating on the public highway what was in fact, an unregistered vehicle. Pierce could never have anticipated such intervening criminal conduct by Humphrey; and certainly it was not within the scope of any permissive use authorized by the named insured.

This position is further substantiated in *Freeman v. Nationwide Mutual Ins. Co.*, 147 Conn. 713, 716-717 (1960), where the court said:

“‘Actual use,’ as used in a policy similar to the one in issue, has been interpreted by us as meaning that where a car is entrusted to someone other than the named insured for a particular purpose, it must be used in furtherance of that purpose at the time of the accident in order to come within the terms of the policy. *Libero v. Lumbermen’s Mutual Casualty Co.*, 141 Conn. 574, 577, 108 A.2d 533.”

On the other hand, the liability coverage provisions in the United Services policy (Plaintiffs’ Exhibit 24), clearly

provided coverage to Humphrey in his operation of this uninsured vehicle under Part I - Liability, Definitions, it states:

"... 'temporary substitute automobile' means any automobile or trailer not owned by the name insured, while temporarily used as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, or destruction."

Counsel for both parties in the presentation of this case agreed, that if it were proven that Pierce had in fact, given Humphrey permission to operate his car on the public highway to and from his work on the day in question, then Glens Falls would have been the primary carrier and United Services would have been the secondary carrier for the coverage liability for any recovery above the \$25,000 maximum Glens Falls coverage, plus the \$1,000 for medical payments.

#### **Waiver Issue**

A second phase of liability, which the plaintiffs assert against the defendant Glens Falls, is that it is now precluded from denying primary liability coverage for this accident, because by its late filing of a reservation of rights it has waived this defense. Counsel for Glens Falls appeared in the state court suit in defense of Humphrey (its omnibus clause insured), on August 10, 1962. The first notice of reservation of rights was given to Humphrey on March 29, 1963, about seven and one-half months later. The plaintiffs now claim that when Glens Falls withdrew its defense of Humphrey on November 21, 1968, when the state court plaintiff Jerz filed a substituted amended complaint omitting Pierce altogether as a party defendant, Glens Falls by its own prior conduct had already waived its right to deny coverage to Humphrey. The plaintiffs contend that the defendant is now liable for the state court judgment, the costs, interest, attorney's fees, and all ex-

penses, because Glens Falls unlawfully withdrew from Humphrey's defense.

Under Connecticut insurance law, if the allegations of the plaintiff's complaint in any action against a named insured state facts which appear to bring the injury within the policy coverage, the insurance company has a legal duty to defend; and this is so, even when the insurer's own investigation may determine the true facts to be otherwise.

In the case of *Missionaries Co. of Mary, Inc. v. Aetna Casualty & Surety Co.*, 155 Conn. 104, 110 (1967), the court said:

"The question whether the defendant had a duty to defend the action . . . depends on whether the complaint in that action stated facts which appeared to bring [the plaintiff's] claimed injury within the policy coverage. *Andover v. Hartford Accident & Indemnity Co.*, 153 Conn. 439, 442, 217 A.2d 60; see, for a collection of cases on this subject, note, 50 A.L.R. 2d 458, 468 § 6. The duty to defend has a broader aspect than the duty to indemnify and does not depend on whether the injured party will prevail against the insured. *Smedley Co. v. Employers Mutual Liability Ins. Co.*, 143 Conn. 510, 516, 123 A.2d 755. This general rule is practically universally recognized."

Under the allegations of the original complaint in *Jerz v. Pierce and Humphrey*, the state court suit, Pierce's insurer, Glens Falls, was required by law to furnish a defense not only to Pierce, as its named insured, but also to Humphrey as its omnibus insured. The reason for this is because of the assertion in the Jerz complaint that Humphrey was operating Pierce's vehicle at the time of the accident "as the servant and agent of Pierce and in furtherance of the latter's business and with his consent, knowledge and permission." However, such an allegation of course, must be proven, and standing alone does not automatically make the additional party an assured under the policy for indemnification purposes, until that relationship is established.

Waiver has generally been described as the intentional relinquishment of a known right. Certainly when Glens Falls appeared for Humphrey under its omnibus coverage clause, it was acting only because the law required that it do so. Failure on its part to defend against the allegations of agency and permission would have, as a matter of law, made it liable for any judgment, costs and expenses, regardless of the plaintiff's lack of ability to prove liability against the defendant's named insured, Pierce. The real question is whether or not when Glens Falls did give Humphrey a notice of its liability reservation seven and one-half months later, on March 29, 1967 did the delayed notice under all the circumstances, prejudice Humphrey or his insurer, United Services. The Court is of the opinion that it did not.

From the moment the Humphrey accident was initially reported to his own insurance carrier, United Services, that insurance company assigned its own retained counsel to represent Humphrey in the criminal action; the same legal firm continued to remain off-stage in the wings throughout the controversy as an observer and suggested that Humphrey should look to Glens Falls for primary coverage, because he was an omnibus insured, provided it could be proven that he was driving, at the time of the accident, with Pierce's permission. It was clearly United Services' business strategy throughout, in the handling of this litigation, to unload the responsibility for primary coverage on Glens Falls, if it were at all legally possible to do so. In fact had agency or permissive use been proven, as it was alleged in the Jerz original complaint, that would have been a natural and logical sequence.

However, a unique factual circumstance intervened. On October 3, 1968, the plaintiff Jerz withdrew his original complaint by substituting in its stead an amended complaint, which alleged a different set of facts and conclusions. It named Humphrey as the lone defendant and

changed the whole character of the original suit, which had been pending since June 4, 1962. Thus Pierce, Glens Falls' insured, was no longer a party defendant in the new complaint; no allegations of agency or permissive use were claimed against him.

The substituted complaint, in thus failing to allege any inter-relationship between Pierce and Humphrey destroyed the "omnibus assured" obligation of Glens Falls toward Humphrey, which had originally forced that company to appear in the latter's defense. After proper notice and a court hearing, Glens Falls' counsel was authorized by the court's order to withdraw their representation of Humphrey and United Services' counsel promptly appeared in their stead.

Throughout the six-year period in which the action had been pending, United Services' counsel regularly checked through the official court file in the Clerk's Office to observe the progress of the case and report to the insurer. They were aware that at the pre-trial conference on January 16, 1968, the plaintiff's demand for settlement was \$37,500; while the court estimated \$30,000 to be a fair settlement value. They were aware too that Glens Falls had made no offer and had no intention of making any, because their reservation of rights had been on file since March 29, 1963, five years before the filing of the substituted complaint. Knowing all this, United Services volunteered no offer of settlement; it refrained from formally appearing in the case, even though it knew of the \$75,000 coverage claimed, above the Glens Falls maximum liability policy of \$25,000.

The plaintiffs would represent that Glens Falls failed in its duty to effect a reasonable settlement of the case, knowing all the while that it could only do so by offering and paying out of its own moneys on a liability which it had denied and had previously given notice of a reservation of rights. Neither of the companies concerned, nor the assured

took any other affirmative steps by commencing a declaratory court action or otherwise, to determine which of them should assume the primary insurance coverage obligation.

The Court finds that considering the totality of the period and the circumstance during which this state court action was pending, Glens Falls appeared in this case for Humphrey only as a matter of compulsory legal obligation from August 10, 1962 to the date of the substituted complaint on October 3, 1968. Glens Falls' filing of its reservation of rights on March 29, 1963, seven and one-half months after filing its appearance for Humphrey, was not an unreasonable delay under all of the circumstances. It did not unlawfully harm or prejudice the position of United Services in any material way, to prevent its effecting a more favorable result in the suit. As the Connecticut Supreme Court so aptly said in *Keithan v. Massachusetts Bonding & Ins. Co.*, 159 Conn. 128, 141-142 (1970):

"As the court noted in *Smith v. Ins. Co. of State of Pa.*, supra, 919: 'If the defendant is neither the named insured nor an omnibus insured there is clearly no obligation to defend regardless of the allegations of the petition and irrespective of the soundness or groundlessness of the claim asserted. To hold otherwise is to completely erase from the policy the qualifying phrase 'against the insured,' contained in II(a) . . .' Also, as stated in *Travelers Ins. Co. v. Tymkow*, 87 N.J. Super. 107, 113, 208 A.2d 176: 'It can certainly not have been the intention of the named assured . . . to provide insurance benefits for any and all alleged principals that an injured third party could dream up.'

"We find the logic and reasoning of such cases is the *Smith* case persuasive under the circumstances of the present case. Since *Keithan* was not an insured under the Mass. Bonding policy and since the contract duty of the insurer was limited to providing a defense to any suit 'against the insured,' Mass. Bonding performed its full contract duty in providing a defense to Porto, its insured, and was under no contract duty to provide a defense for an uninsured stranger to the contract such

as Keithan, simply because a third party had alleged facts which, if true, would have given Keithan the status of an insured."

So also in this unique factual sequence of circumstances, simply because the allegations of the original suit forced Glens Falls, as a matter of law, to defend Humphrey originally, United Services cannot expect it to keep Glens Falls permanently boxed in to the liability, when a substituted complaint changes the relationship and responsibility of the insuring parties under the respective contracts. The Court finds that United Services was not prejudiced by the Glens Falls action in withdrawing its representation of Humphrey, after proper notice and hearing was had and with the court's approval.

Appendix "A" shall constitute the findings of fact in this case and is incorporated herein by reference. The foregoing opinion shall constitute the conclusions of law required to be filed by the Court, pursuant to Rule 52(a), Fed. R. Civ. P.

Judgment may enter on all issues for the defendant against both plaintiffs. SO ORDERED.

Dated at Hartford, Connecticut, this 8th day of September, 1976.

T. EMMET CLARKE,  
*Chief Judge*

## **Appendix "A"**

### **Findings of Fact**

1. The defendant, Glens Falls Insurance Company (Glens Falls) had an automobile liability insurance policy No. 35549, which was in effect on February 13, 1962 with Albert Keith Pierce as the named insured.
2. Albert Keith Pierce owned a 1953 Volkswagen, No. 1-0519855, on that date.
3. On February 13, 1962, the plaintiff, David G. Humphrey was the driver of the above car when he was involved in an accident with a pedestrian, Edward Jerz.
4. About ten days or two weeks before February 13, 1962, Pierce drove his 1953 Volkswagen to Humphrey's home in Tuttles Point in the Town of Guilford.
5. Prior to the time Pierce had the car for sale at his home in Newtown, Connecticut and decided that chances for a sale might be better in the area where Humphrey lived and by mutual agreement turned the car over to Humphrey to sell.
6. Upon turning the car over to Humphrey, Pierce removed the license plates from the car, assisted by Humphrey, and told Humphrey the car was uninsured.
7. At that time Humphrey knew and was told the car was unregistered and uninsured and not to be used off of the private area surrounding Humphrey's home.
8. Roads adjacent to and surrounding Humphrey's home for a distance of between one and a half and two miles were private roads.
9. At the time he left the car at Humphrey's home, Pierce mentioned to Humphrey that the car was unregistered and uninsured and he, Humphrey, should not take it away from there.

10. The only reason the car was turned over to Humphrey was so that Humphrey could attempt to sell and/or sell it to a purchaser. Pierce felt that there was a better market for his car along the shore and therefore Pierce and Humphrey agreed that Humphrey would attempt to sell it and could keep any proceeds over \$235.00.

11. On the morning of February 13, 1962, Humphrey, who was employed in a factory in Meriden, Connecticut, attempted unsuccessfully to start his own Volkswagen automobile for the purpose of driving to work.

12. Unable to start his own motor vehicle and not wishing to use another motor vehicle owned by him, because his wife wanted to use it that day, Humphrey removed the license plates from his own Volkswagen placed them on Pierce's Volkswagen and drove to his place of employment.

13. Plaintiff Humphrey worked all that day at his place of employment and upon the conclusion of his day's work, started to return to his home in Guilford by driving the Pierce Volkswagen.

14. On his way home while passing through the Town of North Branford, the motor vehicle he was operating struck and seriously injured Edward Jerz.

15. Humphrey's purpose in using the Pierce Volkswagen on the day of the accident was solely and exclusively for the purpose of transporting himself from his home to his place of employment and to return to his home after his day's work was completed.

16. The trip between Humphrey's home and his place of employment was in no way directly or indirectly connected with the sale or attempted sale of the motor vehicle.

17. At no time did Pierce, expressly or impliedly give Humphrey permission to operate the motor vehicle on a public highway in the State of Connecticut.

18. At no time did Pierce give Humphrey permission to operate the motor vehicle for his personal objectives.

19. Plaintiff Humphrey promptly reported the accident to the McGinn Company, Connecticut representative of the plaintiff United Services Automobile Association, and said representative referred Humphrey to the firm of lawyers who represented United Services in the Connecticut area and a member of that firm represented Humphrey in the prosecution of Humphrey by the State of Connecticut on motor vehicle violation charges, including the charge of operating an unregistered motor vehicle on a public highway.

20. Charges for the legal services rendered to plaintiff Humphrey in the case of *State of Connecticut vs. Humphrey* were paid by plaintiff United Services.

21. On the date of the accident, February 13, 1962, plaintiff United Services' policy of liability insurance in the amount of \$100,000 coverage (Plaintiffs' Exhibit 24) by its terms covered plaintiff Humphrey's liability on account of the accident of February 13, 1962.

22. On said date defendant Glens Falls Insurance Company had in force and effect a policy of insurance (Plaintiffs' Exhibit 1) covering Albert Keith Pierce, the owner of the Volkswagen involved in the accident, for liability arising out of the operation of said Volkswagen in the amount of \$25,000.

23. In said Glens Falls' policy Albert Keith Pierce was the named assured and there was a provision as follows:

"Persons Insured: The following are insureds under the Liability and Medical Expense Coverages:

- (a) With respect to an owned automobile,
  - (1) The named insured.
  - (2) Any other person using such automobile to whom the named insured has given permission, provided the use is within the scope of such permission."

24. Upon learning of the probable existence of said Glens Falls' policy, the plaintiff United Services, its servants and agents, advised and caused plaintiff Humphrey to report said accident to defendant Glens Falls.

25. Both plaintiff United Services and defendant Glens Falls investigated said accident.

26. Edward Jerz brought an action returnable to the Superior Court for New Haven County the first Tuesday of July, 1962 to recover damages because of injuries sustained in the accident of February 13, 1962. (Plaintiffs' Exhibit 4).

27. In that action Albert Keith Pierce and the plaintiff Humphrey were named defendants and damages in the amount of \$100,000 was claimed.

28. Plaintiff Humphrey was sued as the operator of the motor vehicle which struck and injured Jerz and as to Albert Keith Pierce, it was alleged that he owned the automobile and that Humphrey was operating the car with the consent, knowledge and permission of Pierce, as the servant and agent of Pierce, in furtherance of his business.

29. Aetna Casualty & Surety Company, as plaintiff, brought an action against said Humphrey and Pierce, as defendants, returnable to the Eighth Circuit Court of the State of Connecticut, on the third Tuesday of February, 1963, which action arose out of the accident of February 13, 1962, and claimed damages of \$2,000 because plaintiff Aetna had paid Jerz \$1,767.43 under the terms of an insurance policy issued by Aetna to Jerz and in said action Aetna claimed to be subrogated to the rights of Jerz against Humphrey and Pierce.

30. This action by Aetna alleged Humphrey was operating an automobile owned by Pierce and was operated by Humphrey as the agent, servant and/or employee, and with the permission of Pierce.

31. The action by Aetna was transferred to the Superior Court of New Haven County but was not prosecuted by Aetna because the damages claimed by Aetna were included in the damages claimed by Jerz in this action and if Jerz recovered damages in his action, he would reimburse Aetna for its expenditures.

32. The law firm of Pouzzner and Hadden, at the direction of defendant Glens Falls, entered its appearance for the defendants in the action brought by Aetna.

33. In the action brought by Jerz, at the direction of defendant Glens Falls, the law firm of Pouzzner and Hadden entered its appearance for Pierce on July 17, 1962 and for Humphrey in early August, 1962.

34. Thereafter, Pouzzner and Hadden competently represented the defendants in the action of *Jerz v. Humphrey*.

35. The only demand made by the plaintiff Jerz for settlement purposes was \$37,500. No offer was made by Pouzzner and Hadden because defendant Glens Falls took the position that its policy of insurance did not cover the plaintiff Humphrey because he was not using the motor vehicle of Pierce with the permission of Pierce within the scope of such permission.

36. In July and August, 1962, Glens Falls was alerted by Pouzzner and Hadden to the need for sending out a reservation of rights letter at that time. (Plaintiffs' Exhibits 65 and 68).

37. No reservation of rights letter was sent to Humphrey until March 29, 1963, when an attorney from Pouzzner and Hadden wrote such a letter to him. (Plaintiffs' Exhibit 39).

38. From August, 1962 until November, 1968, Pouzzner and Hadden continued to represent Humphrey in the Jerz lawsuit. (Plaintiffs' Exhibit 45).

39. Defendant Glens Falls directed Pouzzner and Hadden to enter their appearance for the defendants Pierce and

Humphrey because Glens Falls was advised by Pouzzner and Hadden that the complaint in each case alleged a cause of action, which if proven, would be covered by its insurance policy issued to Pierce and, under the laws of the State of Connecticut, Glens Falls had to afford Pierce and Humphrey a defense notwithstanding that its investigation disclosed a set of facts and circumstances not covered by the terms of its policy.

40. The case of *Jerz v. Humphrey* was reached for trial in the Superior Court in October, 1968.

41. Under date of October 3, 1968, plaintiff Jerz filed a motion to drop Albert Keith Pierce as a party defendant and for permission to file a substituted complaint, which motion was duly heard and granted by the court on said October 3, 1968. (Plaintiffs' Exhibit 45).

42. Under date of October 4, 1968, plaintiff Jerz filed a substituted complaint. (Plaintiffs' Exhibit 45).

43. The substituted complaint contained no allegation of ownership of the motor vehicle by Pierce and contained no allegation that the use of the motor vehicle was with the permission of Pierce or that Humphrey was acting as the agent and servant of Pierce at the time of the accident. (Plaintiffs' Exhibit 45).

44. On October 30, 1968, plaintiff Jerz filed in court a written withdrawal of his action against Albert Keith Pierce. (Plaintiffs' Exhibit 45).

45. Under date of October 30, 1968, Pouzzner and Hadden at the direction of Glens Falls, filed a motion with proper notice to Humphrey, requesting permission to withdraw its appearance for the defendant David G. Humphrey. (Plaintiffs' Exhibit 45).

46. On November 8, 1968, the Superior Court after a hearing ordered that the firm of Pouzzner and Hadden be and are given permission to withdraw their appearance for

the defendant, David G. Humphrey. (Plaintiffs' Exhibit 45).

47. Under date of November 20, 1968, after due notice to Humphrey, Pouzzner and Hadden filed a written withdrawal of appearance for defendant, David G. Humphrey.

48. From the date of the accident to November 20, 1968, the law firm of Tyler, Cooper, Grant, Bowerman and Keefe had represented United Services and Humphrey in connection with the 1962 accident, were well aware of the pendency of the lawsuits and the position of Glens Falls with respect to policy coverage but failed and refused to enter their appearance for Humphrey in the pending Superior Court actions.

49. Tyler, Cooper, Grant, Bowerman and Keefe from the bringing of the litigation kept track of and advised United Services concerning the progress of the same by inspection of the court records, oral and written communications with Pouzzner and Hadden and oral and written communications with Humphrey.

50. On January 8, 1969, Tyler, Cooper, Grant, Bowerman and Keefe entered their appearance for Humphrey in Docket No. 98756, *Jerz v. Humphrey*, then pending in the Superior Court.

51. On said January 8, 1969, upon request, Pouzzner and Hadden turned over to Tyler, Cooper, Grant, Bowerman and Keefe that portion of their file as set forth in Plaintiffs' Exhibit 56 which documents were sufficient to bring said firm up to date on all material happenings in the case to the date thereof.

52. Thereafter, Tyler, Cooper, Grant, Bowerman and Keefe handled the litigation through a jury trial in the Superior Court and an appeal to the Supreme Court of the State of Connecticut.

### Conclusions

53. The fact that written notice by Glens Falls to Humphrey, reserving its right to claim that its insurance policy did not cover Humphrey insofar as liability for the accident on February 13, 1962 was concerned, was not given to Humphrey until approximately seven and one half months after Pouzzner and Hadden entered their appearance for Humphrey in no way prejudiced either Humphrey or United Services in their defense of the *Jerz* case or constituted a waiver of any rights of Glens Falls to deny coverage to Humphrey.
54. Glens Falls' action in providing a defense to Humphrey as long as the complaint alleged a cause of action which if proven, would come within the policy provisions of the policy issued by Glens Falls, fully discharged Glens Falls' obligation to Humphrey.
55. The defense afforded Humphrey by his attorneys during the Superior Court trial was in no way prejudiced by any action or conduct of either Glens Falls or Pouzzner and Hadden.

[Filed September 8, 1976]

**Judgment**

This action came on for trial before the Court, Honorable T. EMMET CLARIE, United States District Judge, presiding, and the issues having been duly rendered, under date of September 8, 1976, with Findings of Fact.

It is Ordered and Adjudged that judgment be and is hereby entered in favor of the defendant on all issues and against both plaintiffs, with costs to the defendant.

[Filed September 13, 1976]

## PLAINTIFFS' PROPOSED FINDINGS

### [Excerpts]

6. Both policies had a provision that an owner's policy is primary and an operator's policy is secondary or excess. (Requests for Admissions, #5, 6).
8. Pierce and Humphrey had been close friends for many years prior to February, 1962. (Tr. 150-51, 215).
9. Pierce and Humphrey had at various times driven each other's car for periods ranging up to twenty-four hours. (Tr. 238-39, 216).
20. By early August, 1962, GFIC had sufficient information to make a decision about its possible coverage defenses concerning Humphrey. (Tr. 254-55; Plaintiffs' Exhibits 6, 25-28, 63-65, 68).
21. In July, 1962, an attorney for Pouzzner and Hadden had informed GFIC that its coverage defense as to Humphrey would probably be unsuccessful. (Plaintiffs' Exhibit 68).
24. No other reservation of rights letter was ever sent to Humphrey by or on behalf of GFIC. (Tr. 155-56).
27. As long as the primary carrier has hired competent counsel, the customary practice of Connecticut attorneys representing defendants in tort litigation is that the attorneys retained by the excess carrier should generally not enter an appearance on behalf of the insured when the primary carrier has already done so. (Tr. 345-46).
28. Some of the arguments against double appearance are that misunderstandings may arise as to which attorney speaks for the insured in court, communication problems may result if one attorney thinks the other is doing something, and the jury is more apt to realize the defendant is insured. (Tr. 345, 86-87).

29. The customary practice of Connecticut attorneys representing defendants in tort litigation as to when and by whom a reservation or rights letter is sent to the insured is that it be sent directly by the insurance carrier to the insured as soon as the carrier has the information upon which to make the reservation decision. (Tr. 340-41).

30. The customary practice of Connecticut attorneys representing defendants in tort litigation is that the attorney hired by the primary carrier keeps the attorney hired by the excess carrier informed of the progress of the case and attempts to initiate and coordinate settlement negotiations. (Tr. 355-57).

33. Attorney Winer, USAA's attorney, became aware of negotiating positions at the pretrial later in January, 1968. (Tr. 35).

34. In September, 1968, Attorney Clarence Hadden of Pouzzner and Hadden informed Attorney Winer that the plaintiff's \$37,500 demand was "way out of line", that the judgment would be around \$20,000, and that the plaintiff might settle for something less. (Plaintiffs' Exhibit 49).

35. In August and September, 1968, Pouzzner and Hadden had numerous correspondence with Humphrey indicating that it was requiring him to be available to attend the trial and that it was preparing to represent Humphrey in the impending trial. (Defendant's Exhibit 5-9, 15).

36. In September, 1968, a second pretrial was held which USAA's attorney was not permitted to attend. (Tr. 293-94).

39. In January, 1969, Attorney Winer's law firm became aware that Pouzzner and Hadden felt in 1966 that the case was one of probable liability and probably would result in a verdict of \$25,000 or more. (Plaintiffs' Exhibit 53).

40. During the period when Pouzzner and Hadden represented Humphrey, GFIC in fact had intentionally taken and

maintained a position that it would do nothing to attempt to settle the *Jerz* case on behalf of Humphrey. (Plaintiffs' Exhibits 32-35).

41. Attorney Winer's attempts at settlement negotiations in 1969 were hampered by the fact that *Jerz*'s attorney was involved in a serious automobile accident in early 1969. (Tr. 103).

42. In the fall of 1969, the case again was pretried, and the pretrial judge (Judge Parskey) indicated he thought the case was worth more than \$40,000; at that point the plaintiff made no demand. (Tr. 103-04).

43. GFIC refused in the fall of 1969 to participate in any way in the trial or settlement of the *Jerz* case. (Plaintiffs' Exhibit 20-22).

44. The trial started at the beginning of November, 1969, and on November 8, 1969, the Court (Judge Parskey) indicated to the attorneys in chambers that it felt the ad damnum of \$100,000 was insufficient and that the case was worth \$250,000. (Tr. 109-11).

45. The Court's statement was immediately conveyed to Humphrey, who became very upset and concerned about his assets. (Tr. 110, 229-30).

46. The next morning the Court remarked that it would not permit the ad damnum to be increased. (Tr. 301).

47. This statement was immediately conveyed to Humphrey, but with the caution that the plaintiff intended to press such a motion and there was no assurance what the Court would do. (Tr. 301).

48. On November 11, 1968, the plaintiff moved to raise the ad damnum to \$200,000, and this motion was denied on November 12, 1968. (Plaintiffs' Exhibit 45).

51. USAA then paid the judgment, plus costs and interest to May 3, 1971, in the amount of \$45,747.65. (Plaintiffs' Exhibit 36).

52. On May 26, 1971, USAA paid reasonable attorneys fees and expenses in order to defend Humphrey in the Jerz action in the amount of \$9,480.24. (Plaintiffs' Exhibit 2).

53. On May 26, 1971, the USAA paid reasonable attorneys fees and expenses in order to protect its interests and to monitor the defense of Humphrey by Pouzzner and Hadden in the amount of \$3,003.25. (Plaintiffs' Exhibit 3).

[Filed April 1, 1976]

**DEFENDANT'S ANSWER TO INTERROGATORY  
OF 9/28/73**

**[Excerpt]**

Interrogatory 1: "... On what date . . . were you put on notice:

- (a) of the accident?
- (b) of the claim that you had primary coverage?"

Answer: "(a) February 27, 1962 . . .

- (b) April 25, 1962 . . ."

\* \* \* \* \*

**PLAINTIFFS' REQUESTS FOR ADMISSIONS**

**[Excerpt]**

(Not objected to)

- 5. The [Glens Falls] policy had a provision that an owner's policy is primary and an operators' policy is secondary or excess.
- 6. Mr. Humphrey had a similar policy provision with U.S.A.A.

## EXHIBITS

[PLAINTIFFS' EXHIBIT 1 (excerpt from Glens Falls Policy, page 1)]

"Persons Insured: The following are insureds under the liability and medical expense coverages:

- (a) [quoted in finding 23]
- (b) [immaterial]
- (c) any other person or organization legally responsible for the use of
  - (1) an owned automobile, or
  - (2) a non-owned automobile, if such automobile is not owned or hired by such person or organization, provided the actual use thereof is by a person who is an insured under (a) or (b) above with respect to such owned or non-owned automobile."

[PLAINTIFFS' EXHIBIT NO. 17]

September 4, 1968

Mr. David G. Humphrey  
Box 128  
White Hall, Maryland 21161

Re: *Edward Jerz vs.*  
*A. Keith Pierce, et al*

Dear Mr. Humphrey:

The case of Jerz against you and Mr. Pierce was reached for trial today but was continued until September 17. Jerz's attorney was not ready to proceed and the continuance was at his request. Unless you hear from us to the contrary, it will be absolutely imperative that you be here in New Haven on that date. The trial will probably take several days and it will be necessary for you to be present during the entire court proceedings.

As we wrote you under date of August 29th, there are several matters that should be discussed with you prior to the trial. We have decided to call one of them to your attention by means of this letter.

You are of course familiar with the claim of the Glens Falls Insurance Co. that, while it is obligated to defend the pending lawsuit on behalf of the defendants, it is the company's position that, under the facts of the case and the law applicable thereto, the policy of insurance which it issued to Mr. Pierce does not require the company to pay any judgment that may be rendered against you.

At the time of the accident, you were the owner of two automobiles, both of which were covered by insurance. The question then arises as to whether either or both of these policies covered you in the operation of the car at the time of the accident. Despite the fact that your company was promptly notified of the accident and is aware of the pendency of the lawsuit by Jerz against you, it has not entered an appearance on your behalf nor has it taken any action in the pending lawsuit other than to have its attorneys request this office to keep them advised of developments in the case.

As your attorneys we are retained to represent you in the defense of the pending lawsuit. The pending lawsuit does not seek a determination of your right to be protected from loss because of any judgment that may be rendered against you. We believe there is a procedure that can be initiated by you which would cause this question to be adjudicated in the present lawsuit. Strictly speaking, however, such procedure is not included in our authority to defend you in the present pending lawsuit.

If you desire, we would be willing to explain further this phase of the matter. If you desire to seek other legal advice from attorneys of your own choice, and at your own expense, then it would seem that you are at liberty to do so.

Will you kindly advise this office immediately what, if any, action you intend to take.

Very truly yours,  
William L. Hadden

[PLAINTIFFS' EXHIBIT NO. 32]

Glens Falls Insurance Company Inter-office Memo

To: E. G. Fagan, Supt.

From: Svend A. Arildsen, Claims Mgr.

Date: 10-30-67

Dear Ed:

It seems to me that we both had received the impression that we could not hope to get a decision of no agency — but now our counsel definitely states that plaintiff cannot prove agency!

Such being the case, there should not be any desire on our part to try and settle this.

It looks like our best bet would be to go through with this one.

Svend Arildsen

[PLAINTIFFS' EXHIBIT NO. 33]

Glens Falls Insurance Company Inter-office Memo

To: Svend A. Arildsen, Claims Mgr.

From: E. G. Fagan, Supt.

Date: 5/23/68

Subject: 13AL 39236

*Edward Jerz vs. Albert K. Pierce*

Dear Svend:

This file has come out on routine diary, and I note that I have heard nothing from you since you made available Mr. Hadden's letter of January 17, 1968.

It is my recollection, that in the average situation there is real activity following a pre-trial, such as was had in this case before Judge Grillo.

The last we knew, the demand was \$37,500.00, and of course we are not remotely interested in such a figure, nor for that matter in any figure, as we do not believe that the plaintiff can prove agency.

At your convenience, will you let us please have a pre-status report on this case which has many interesting aspects.

Regards.  
E. G. Fagan

[PLAINTIFFS' EXHIBIT NO. 34]

Glens Falls Insurance Company Inter-office Memo

To: E. G. Fagan

From: Svend Arildsen

Date: 6/11/68

Dear Ed:

I attach latest developments. All I can say about our counsel's response of 6/7/68 to Attorney Winer is:

Hit 'em again!

Svend A.

[PLAINTIFFS' EXHIBIT NO. 35]

Glens Falls Insurance Company Memo

To: Svend A. Arildsen

From: E. G. Fagan

Date: 6/27/68

Dear Svend:

Thank you very much for your memorandum of the 11th together with correspondence received from Clarence Had- den of New Haven counsel.

I was very much impressed with the letter of Mr. Hadden addressed to Louis M. Winer under date of June 7 and I heartily agree with Mr. Hadden that our opponent here went much too far and he really asked for the "slap" that Clarence gives him in his letter of June 7.

You have apparently looked with favor on Mr. Hadden's comments as you suggest that we "Hit 'em again."

I am in full accord with this as it is about time that some of our very clever adversaries recognize that we have rights and perogatives and these we are going to defend to the hilt.

It is as you know our considered opinion that the plaintiff here will have a difficult task to prove agency and consequently it may very well be that this recent development is more or less in the nature of an harassment procedure on the part of Mr. Winer.

Please do continue to keep us periodically advised on developments in this case.

Ed Fagan

[PLAINTIFFS' EXHIBIT NO. 39]

March 29, 1963

Mr. David G. Humphrey  
Walnut Avenue  
Guilford, Conn.

Re: *Edward Jerz and Aetna Casualty v.  
Humphrey and Pierce*

Dear Mr. Humphrey:

This office represents the Glens Falls Insurance Company and at the request of that company, we have filed an appearance for you and shall defend the recent action brought by Aetna Casualty and Surety Company in the Eighth Circuit Court. We have also appeared for you and shall defend your interests in the earlier action brought by Edward Jerz in the Superior Court, New Haven County.

This letter is to inform you that it is the position of Glens Falls Insurance Company that at the time of the accident of February 13, 1962, you were not operating Mr. Pierce's automobile as Pierce's agent or with his permission. The company claims further that you were operating outside of the scope of any permission given to you by Pierce. We, therefore, notify you that any action taken or that may be taken by the Glens Falls Insurance Company in investigating, settling, appearing in or defending any claim or suit, arising from this accident, shall not be held as an admission of liability by the company nor as a waiver of the company's right to disclaim or to operate by way of estoppel against the company and further that the insurance company may, at any time, rescind this notice and proceed under its rights as provided in the policy between it and the said A. Keith Pierce.

By referring to certain causes of disclaimer above, we are not to be understood to be waiving any other cause which may now exist or which may later come into existence.

Very truly yours,  
POUZZNER & HADDEN  
By Clarence A. Hadden

[PLAINTIFFS' EXHIBIT NO. 49]

September 10, 1968

Certified Mail Return Receipt Requested

Pouzzner & Hadden  
Second National Bank Building  
129 Church Street  
New Haven, Connecticut 06508

Attention: Clarence A. Hadden, Esquire

Re: *Jerz v. Humphrey*

Dear Mr. Hadden:

After I spoke to you today by telephone, I spoke to David G. Humphrey and United Services Automobile Association

about the above case. We represent both Mr. Humphrey and United Services and are writing this at their request.

We asked in the letter we sent you August 8, 1968, what your view of the case was as to defendant David G. Humphrey regarding both liability and damages. Not having received an answer, I called again today with pretty much the same question. I understand from our conversation that plaintiff's most recent demand was \$37,500, which you thought was way out of line; that you had not had occasion to evaluate the case because your client, Glens Falls Insurance Company, was not willing to offer anything towards settlement; that you considered it most likely that plaintiff would recover a judgment and that Mr. Humphrey's defenses would not succeed; that, as a rough estimate, the judgment would be in the neighborhood of \$20,000; and that plaintiff might settle for something less.

\* \* \*  
Very truly yours,  
Louis M. Winer

[PLAINTIFFS' EXHIBIT NO. 53]

January 23, 1969

Tyler, Cooper, Grant, Bowerman & Keefe, Esqs.

P. O. Box 1936

205 Church Street

New Haven, Connecticut

Re: *Jerz v. Humphrey*

Gentlemen:

This will acknowledge receipt of your letter of January 10th on the above matter. We are enclosing a copy of our letter of June 10, 1966, addressed to Glens Falls Insurance Company, containing an evaluation of liability and of damages in this case. For proper understanding of the letter, you should understand that the limit of the Glens Falls Policy was \$25,000.00.

Of the material requested by your letter of January 10th, the enclosed is the only item available from our file for your information.

Very truly yours,  
POUZZNER & HADDEN  
By Clarence A. Hadden

[This letter is attached to letter of 1/23/69]

June 10, 1966

Glens Falls Insurance Company  
80 Farmington Avenue  
Hartford, Connecticut

Re: 13AL39236  
*Jerz vs. Pierce*

Gentlemen:

This will acknowledge receipt of your letter of June 8 on the above matter. As requested, we have reviewed this file on the question of liability and settlement value aside from any coverage problems. In our opinion, this is a case of probable liability.

The operator concedes that he was going about 45 miles per hour and was straddling the center line. Under all of the circumstances of the accident plus the admission with regard to speed, it might well be concluded by the jury that the operator was going too fast for conditions. Also the jury might well hold that the straddling of the center line was to some extent a proximate cause of the accident, and again have a basis for liability. It, therefore, appears that the defendant cannot escape a verdict on the ground of complete lack of any negligence on his part.

It, therefore, becomes a question of contributory negligence. We have the operator's version that plaintiff was running across this highway, but there is no corroboration of this claim. In a case of this sort, that is a pedestrian knock-

down case, the sympathies of the jury are bound to be with the plaintiff; and, in this particular instance, because of the very serious injuries it is very safe to say that without question plaintiff will have the sympathy of the jury. It is, therefore, most probable that the verdict in this case will be for the plaintiff.

This man sustained very serious injuries and has incurred substantial hospital and medical expense, and in addition there is a claim of 55 weeks loss of earnings totalling over \$6,000. The final result of his injuries are not known, but it is certainly safe to say that there will be permanent disabilities. On the whole picture, we can only conclude that trial of this matter will most probably result in a verdict for the plaintiff of \$25,000 and might well exceed that amount if any serious permanent disabilities result.

The only hope of reducing that amount would be by way of convincing the jury that there was a degree of contributory negligence and this might result in a compromise verdict. It seems certain that such a compromise would not be less than \$15,000. We do recommend that this plaintiff's deposition be taken.

Very truly yours,  
POUZZNER & HADDEN  
By Clarence A. Hadden

[PLAINTIFFS' EXHIBIT NO. 55]

January 10, 1969

Certified Mail — Return Receipt Requested

Pouzzner & Hadden, Esquires  
129 Church Street  
New Haven, Connecticut

Re: *Edward Jerz v. David G. Humphrey*, No. 98756,  
Superior Court, New Haven County

Gentlemen:

On January 8, 1969, Mr. Robert Ciulla of this firm received from you portions of the file in the above case.

We hereby request on behalf of Mr. David G. Humphrey, the defendant in the above case, that you provide us with the remainder of your file, including but not limited to, reports of physical examinations of the plaintiff made by physicians on your behalf or on behalf of the Glens Falls Insurance Company, evaluations of liability and damages in the case made by you, correspondence between you and the Glens Falls Insurance Company with respect to evaluations of liability and damages and with respect to the defense of Mr. Humphrey, all investigative reports of any nature, and any and all correspondence between you and Mr. Humphrey.

You will recall on November 18, 1968, Mr. Humphrey authorized you to turn the entire file pertaining to the above case over to us, and on November 25, 1968 you stated to Mr. Humphrey that once we filed our appearance in the case on his behalf you would be glad to comply with his request. We ask you that you now do so.

Very truly yours,  
TYLER, COOPER, GRANT,  
BOWERMAN & KEEFE

By Lawrence W. Iannotti

cc: Glens Falls Insurance Company  
141 Washington Street  
Hartford, Connecticut

[PLAINTIFFS' EXHIBIT NO. 56]

January 8, 1969

Received from Pouzzner & Hadden, on the matter of *Jerz v. Humphrey*, Superior Court, New Haven, No. 98756:

Deposition of Plaintiff 8/11/66  
Complaint and Substituted Complaint  
State Police Report F-1214-S  
Answer

Reply

Report of Dr. Southwick to Brandon 9/26/62

Motion for Disclosure

Answer to Motion for Disclosure

Material Produced for Inspection

Report of Dr. Southwick to Fitzgerald 10/8/68

Statement of Humphrey 2/14/62

/s/ Robert Ciulla

Attorney for David G. Humphrey

[DEFENDANT'S EXHIBIT NO. 2]

December 5, 1962

United Services Automobile Association  
U.S.A.A. Building, 4119 Broadway  
San Antonio 8, Texas

Attention: Mr. Craig F. Ross

Re: *David G. Humphrey, Jerz v. 4-N-19 00 04-4*

Dear Craig:

I talked recently with your insured and have been advised that he never got back the certified mail return receipt. While the envelope and stamp were all prepared for him to send, it would appear that rather than take the letter to the post office, he merely dumped it into a mailbox and the return receipt card could well have gotten lost. Therefore, he has not received an acknowledgment of receipt of his letter demanding coverage, but on the other hand, he has received no other correspondence from Glens Falls Insurance Company. In the absence of any such correspondence, we have no indication that there is any specific reservation of rights or restriction on the coverage that is going to be afforded to your insured with respect to this claim.

In view of the appearance by Glens Falls' counsel for your insured, obviously as a result of the letter sent and the request that I made to their counsel, I think it is fair to infer that Glens Falls has, in fact, assumed the respon-

sibility for this accident so far as your insured is concerned, and that they are extending coverage to him under their policy. While their attorney noted that there might be some reservation when I conferred with him, he had no indication of any specific reservation, at that time, and his instructions were to appear. He was given no instructions that would in any way seem to amount to a reservation on the coverage. In the absence of any specific indication to your insured, who has been specifically instructed to forward any correspondence received from Glens Falls Insurance Company, it would be my feeling that that company could not raise a reservation, at some future time. This would be more and more the case as time went on. However, we have had a specific indication of the question being in their minds, and it cannot be said that we have an ironclad guarantee that coverage will be extended to your insured up to the extent of their policy. Of course, on the other hand, the fact that they were alert to the coverage problem and have not specifically advised of any reservation would be a stronger factor in precluding them from raising any such reservation in the future.

It is our feeling that the matter should be best left to lie in its present posture on the grounds that it is a reasonable assumption that Glens Falls has unreservedly extended coverage to your insured under their policy. This will be a fairer presumption as time passes. If your insured is advised of any reservation, he should be specifically instructed to forward that on to us. If he fails to do so, we might very well have a defense under the policy on a theory of lack of cooperation.

If you wish any further action, please advise. Otherwise, we will merely check the court records from time to time.

Very truly yours,  
Peter C. Dorsey

[Defendant's Exhibit No. 3]

April 4, 1963

United Services Automobile Association  
USAA Building  
4119 Broadway  
San Antonio 8, Texas

Attention: Craig F. Ross

Re: *David G. Humphrey, Jr. v. 4-N-19 00 04-4*

Dear Craig:

Enclosed please find a photostatic copy of a letter dated March 29, 1963 from the attorneys representing the Glens Falls Insurance Company and the record to me as well as a copy of a letter enclosed therewith that was directed to your insured.

As you can see from the letter, in particular the first two sentences of the second paragraph, it is the contention of Glens Falls Insurance Company, in effect, that your insured's operation of the Pierce vehicle was not such as would normally come within the scope of the coverage afforded by the Glens Falls policy. It is interesting, however, to note that this is merely a reservation of rights, and not a complete disavowal of any obligation under the policy. Specifically Glens Falls Insurance Company is fulfilling an obligation to a named insured under the policy by providing a defense in each of the two pending actions. What comes down to is that they are reserving the right to pull out of the matter, if it is going to cost them any money over and above the cost of a defense.

I realize that earlier in this matter you had expressed a wish that the matter be turned over to Glens Falls Insurance Company and that in their failure to assume the responsibility for the defense including a judgment that we should move for a declaratory judgment. It is therefore incumbent upon us at this time to determine whether or not to seek a declaratory judgment. If such an action

achieves a favorable result then the first \$25,000 (the amount of the Pierce coverage as I understand it) of any judgment to be paid on behalf of Mr. Humphrey would come from Glens Falls Insurance Company. Under the circumstances of the injury to Mr. Jerz, it is entirely possible that his injuries would bring a recovery in excess of the Glens Falls coverage. If however, there is an unfavorable result in the declaratory judgment action, you will be left with the obligation of defending the suit, including the cost thereof, and of paying the full judgment.

In view of the reservation of rights, it is my suggestion that we sit tight at the present moment and see what Glens Falls position is going to be when the matter of dollars and cents payment to Mr. Jerz is raised. This would either be at the pre-trial or immediately before trial itself. It would seem at that time that Glens Falls would indicate how far they are willing to go in making payment on Mr. Jerz's claim. Having regard to the value of that claim, it might well be worthwhile at that point to make some contribution towards the settlement of the Jerz claim. If however, Glens Falls indicates an unwillingness to make any payment whatsoever, or is willing to make such a small payment, then we could bring a declaratory judgment action. In an event I would definitely recommend that a declaratory judgment action be instituted rather than let Glens Falls Insurance Company try the case against Mr. Jerz and then only then at the last minute determine that they are going to make little or no payment towards the judgment rendered.

My reason for making this recommendation is basically that I would prefer to see Glens Falls take a stand on this case insofar as what payment they will make before we have to make a move. We lose nothing by waiting until later to seek a declaratory judgment and their position insofar as settlement is concerned may very well justify our foregoing a declaratory judgment action. If at the last minute Glens Falls position leaves us with nothing to lose by taking steps

to have the matter of coverage decided, we could always do so.

I would appreciate your reviewing this matter and determining what course of action you wish us to take in this matter.

Very truly yours,  
Peter C. Dorsey

cc:

[DEFENDANT'S EXHIBIT NO. 4]

Attention: Mr. Peter C. Dorsey

May 21, 1963

Re: Claim 4-N-19 00 04-4

Lt.jg. David G. Humphrey, USNR-R

Date of Accident: 2-13-62

Dear Pete:

We have for comment your letter concerning the Reservation of Right's letter written by the Glens Falls Insurance Company to our policyholder in connection with the pending litigation.

We don't think that the letter from Glens Falls' attorneys materially changes anything and we agree with you that so long as they continue to defend Mr. Humphrey that we not file a declaratory judgment suit and that we not take any action in connection with the matter other than to keep abreast of developments in connection with the law suit. If it should be reached for trial, I think we would probably want to sit in on it because of the potential involved.

If Glens Falls should attempt at any time to withdraw from the case, then I think we should enter it and defend Humphrey and at that time file a declaratory judgment suit.

In short we are in agreement with the suggestions contained in your letter and we will appreciate your keeping us advised.

Very truly yours,  
Craig F. Ross  
Supervisor of Litigation

[DEFENDANT'S EXHIBIT NO. 5]

August 12, 1968

David G. Humphrey  
Walnut Avenue  
Guilford, Connecticut

Re: *Jerz vs. Humphrey and Pierce*  
Dear Mr. Humphrey:

You will recall that this office at the request of the Glens Falls Insurance Company is representing you in the above matter. This case may well be reached for trial during the coming fall and matters have arisen which make it necessary for us to confer with you. Will you please telephone the writer, so that we can make a definite appointment for a conference.

Thank you for your cooperation.

Very truly yours,  
POUZZNER & HADDEN  
By Clarence A. Hadden

[DEFENDANT'S EXHIBIT NO. 6]

August 29, 1968

David G. Humphrey  
Box 128  
White Hall, Maryland 21161

Re: *Jerz vs. Humphrey and Pierce*  
Dear Mr. Humphrey:

This will acknowledge receipt of your letter of August 25th on the above matter. This case still remains to be tried in

the Superior Court at New Haven. It may be reached for trial at any time on or after September 4th, 1968. Your presence at the trial is of course imperative for your defense.

There are some features of this case which require consultation prior to the actual trial, and we would, therefore, appreciate it if you would telephone the writer (Area Code 203) 787-2141. We would suggest that such a call be made on business days between the hours of 11:00 a.m. and 1:00 p.m., or 2:30 p.m. to 4:00 p.m. You may reverse the charges.

Very truly yours,  
POUZZNER & HADDEN  
By Clarence A. Hadden

[DEFENDANT'S EXHIBIT NO. 7]

September 4, 1968

Mr. David G. Humphrey  
Box 128  
White Hall, Maryland 21161

Re: *Edward Jerz vs.*  
*A. Keith Pierce, et al*

Dear Mr. Humphrey:

The case of Jerz against you and Mr. Pierce was reached for trial today but was continued until September 17th. Jerz's attorney was not ready to proceed and the continuance was at his request. Unless you hear from us to the contrary, it will be absolutely imperative that you be here in New Haven on that date. The trial will probably take several days and it will be necessary for you to be present during the entire court proceedings.

As we wrote you under date of August 29th, there are several matters that should be discussed with you prior to the trial. We have decided to call one of them to your attention by means of this letter.

You are of course familiar with the claim of the Glens Falls Insurance Co. that, while it is obligated to defend the pending lawsuit on behalf of the defendants, it is the company's position that, under the facts of the case and the law applicable thereto, the policy of insurance which it issued to Mr. Pierce does not require the company to pay any judgment that may be rendered against you.

At the time of the accident, you were the owner of two automobiles, both of which were covered by insurance. The question then arises as to whether either or both of these policies covered you in the operation of the car at the time of the accident. Despite the fact that your company was promptly notified of the accident and is aware of the pendency of the lawsuit by Jerz against you, it has not entered an appearance on your behalf nor has it taken any action in the pending lawsuit other than to have its attorneys request this office to keep them advised of developments in the case.

As your attorneys we are retained to represent you in the defense of the pending lawsuit. The pending lawsuit does not seek a determination of your right to be protected from loss because of any judgment that may be rendered against you. We believe there is a procedure that can be initiated by you which would cause this question to be adjudicated in the present lawsuit. Strictly speaking, however, such procedure is not included in our authority to defend you in the present pending lawsuit.

If you desire, we would be willing to explain further this phase of the matter. If you desire to seek other legal advice from attorneys of your own choice, and at your own expense, then it would seem that you are at liberty to do so.

Will you kindly advise this office immediately what, if any, action you intend to take.

Very truly yours,  
William L. Hadden

[DEFENDANT'S EXHIBIT NO. 8]

September 10, 1968

Mr. David G. Humphrey  
Box 128  
White Hall, Maryland 21161

Re: *Edward Jerz vs.*  
*A. Keith Pierce, et al*

Dear Mr. Humphrey:

Judge Shapiro in the Superior Court today ruled that your case must be proceeded with on Tuesday, September 17. It is, therefore, imperative that you should be in New Haven at this office on that day. The Court session starts at 10:00 a.m. and you should be here at that hour.

Very truly yours,  
William L. Hadden

[DEFENDANT'S EXHIBIT NO. 9]

September 12, 1968

Mr. David G. Humphrey  
Box 128  
White Hall, Maryland 21161

Re: *Edward Jerz vs.*  
*A. Keith Pierce, et al*

Dear Mr. Humphrey:

I have just returned from the Superior Court where Judge Shapiro, the presiding Judge, has ordered the case of Jerz against you continued until Tuesday, October 1. It is, therefore, not necessary for you to be in New Haven on Tuesday, September 17, but it is imperative that you should be here on October 1.

Should there be any change in the assignment of the case for trial on October 1, we will promptly communicate with you.

Very truly yours,  
William L. Hadden

[DEFENDANT'S EXHIBIT NO. 10]

October 7, 1968

Mr. David G. Humphrey  
Box 128  
White Hall, Maryland 21161

Re: *Edward Jerz vs.*  
*A. Keith Pierce, et al*

Dear Mr. Humphrey:

The case of Edward Jerz vs. Mr. Pierce and yourself was reached for trial on Thursday, October 3 before Judge Grillo. We had notified you to be present at the Superior Court at New Haven on the above date, but you did not appear, having apparently taken your instructions concerning your appearance from the office of Tyler, Cooper, Grant, Bowerman and Keefe, Attorneys at Law. While you have informed us that these attorneys are acting as your personal attorney, presumably in the pending lawsuit, the above firm has not entered any appearance on your behalf in the pending lawsuit and only knew of it being reached for trial because of a telephone call that was made to their office after the case was actually reached for trial and assigned to be tried before Judge Grillo and a jury.

The case did not go forward for reasons that we will detail herein, but it was continued for two weeks. As soon as we know, assuming that we are still in the case at that time, we will advise you as to when it is necessary for you to be here. Had you been present last Thursday, we do not know at this time whether the case would have gone forward or not.

Following a conference with Judge Grillo, during which the facts and circumstances concerning your use of the automobile at the time of the accident were disclosed to Judge Grillo, he suggested to the attorney for the plaintiff that the case against Mr. Pierce should be withdrawn and the matter proceeding with yourself as the sole defender. This suggestion of Judge Grillo was adopted and followed by

the attorneys for the plaintiff. On Thursday a regular motion was filed asking permission of the Court to drop the defendant A. Keith Pierce from the case and file a substitute complaint, presumably setting forth a cause of action against you alone. This motion was granted by the Court.

The substituted complaint has not yet been filed but probably will be within a day or so. When we receive this substituted complaint, we will then be in a position to determine, after communicating with the Glens Falls Insurance Co., what position the company desires to take with respect to affording you a defense.

Should the position of the company be any different than it has been up to now, we will of course communicate with you promptly.

Very truly yours,  
William L. Hadden

[DEFENDANT'S EXHIBIT 11]

October 14, 1968

Mr. David G. Humphrey  
Box 128  
White Hall, Maryland 21161  
Re: *Edward Jerz vs.*  
*A. Keith Pierce, et al*

Dear Mr. Humphrey:

Enclosed you will please find a copy of the Substituted Complaint which has been filed in the case of Edward Jerz against you. We are today communicating with Glens Falls Insurance Co., which company retained us to defend you in the case and are requesting the Glens Falls Insurance Co. to advise us as to the position it desires us to take with respect to affording you a defense to the substituted complaint. As soon as we are informed concerning the company's decision, we will promptly advise you. The case is presently on the current assignment list of the Superior

Court, although we are unable at this time to advise you of the exact date that it will be reached for trial.

Very truly yours,  
William L. Hadden

[DEFENDANT'S EXHIBIT NO. 12]

October 30, 1968

Mr. David G. Humphrey  
Box 128  
White Hall, Maryland 21161  
Re: *Edward Jerz vs.*  
*David G. Humphrey*

Dear Mr. Humphrey:

We have been instructed by the Glens Falls Insurance Company to withdraw our appearance as your attorneys in the above-entitled case. Under our Court rules this can only be done by permission of the Court before which the case is pending. We have today filed a motion asking that permission and are enclosing herewith copy of that motion.

This matter will be assigned for a hearing before the Superior Court here in New Haven on Friday November 8.

Very truly yours,  
William L. Hadden

REGISTERED MAIL  
RETURN RECEIPT REQUESTED

[DEFENDANT'S EXHIBIT NO. 13]

November 11, 1968

Mr. David G. Humphrey  
Box 128  
White Hall, Maryland 21161  
Re: *Edward Jerz vs.*  
*David G. Humphrey*

Dear Mr. Humphrey:

We previously wrote you and sent you a copy of our motion to withdraw our appearance on your behalf in the above

case. We advised you that the matter would be heard in the Superior Court here on November 8, 1968. The hearing was held and you did not appear, nor did anyone appear on your behalf. The motion was granted.

You are hereby advised that on Monday, November 18, 1968, we will withdraw our appearance. In order for you to be represented in the case so that you will receive notice of all proceedings therein, including its assignment for trial, there are several things that you can do: First, you can enter an appearance for yourself by writing to the Clerk of the Superior Court here at New Haven. Second, you can retain an attorney to represent you, who should file his appearance, or third, you can demand that Attorneys Tyler, Cooper, Grant, Bowerman & Keefe, who represent the United Services Automobile Association, carriers of the liability insurance on your own automobile, enter their appearance for you.

Should none of the foregoing steps be taken by you, then as indicated above the matter will proceed without any notice of the proceedings being given you.

Very truly yours,  
William L. Hadden

[DEFENDANT'S EXHIBIT NO. 14]

November 25, 1968

Mr. David G. Humphrey

Box 128

Whitehall, Maryland 21161

Re: *Edward Jerz vs. David G. Humphrey*

Dear Mr. Humphrey:

This will acknowledge your letter of November 18. On November 21 we filed our withdrawal of appearance with the Clerk of the Superior Court here in New Haven.

In your letter you refer to the fact that there were two actions brought and we have only withdrawn our appear-

ance on your behalf in the *Jerz* case. At the time these cases were reached for trial and did not go forward because the plaintiff decided to drop Mr. Pierce as a defendant, it was stated to the Court that the case wherein the Aetna Casualty Co. was the plaintiff would be completely withdrawn, because the damages claimed therein were included in the *Jerz* case and obviously could not be recovered in both actions.

In a "P.S." to your letter, you asked us to look into the circumstances under which you drove Mr. Pierce's car. I quote from a written statement executed by you on December 14, 1962 as follows:

"This car was owned by A. Keith Pierce, Sandy Hook, Connecticut, a close friend. Mr. Pierce has recently purchased another car and having been unsuccessful in selling the 1953 VW, he turned it over to me to try and sell it for him. . . . Mr. Pierce drove the car to my house, took off the plates and left the car with me. . . . On the day of the accident, I was unable to start my Microbus because of battery trouble and as my wife had an urgent need for our other car, the 1955 Olds, I took the plates off the Microbus and attached them to Mr. Pierce's VW. I then drove to work in Meriden. On my way home that evening, the accident occurred. During the day of the accident, I did not show the VW to anyone nor did I attempt to sell it."

With regard to your request to turn over the file in the *Jerz* vs. *Humphrey* case to Attorney Louis Winer of Tyler, Cooper, Grant, Bowerman & Keefe, we are writing to that firm and informing them that you have made this request and asking that firm if they desire us to turn over certain documents relating to the *Jerz* case to them. Our reason for writing to them as above indicated is because this firm has previously advised us that on September 12, 1968, you authorized that firm to represent you "in dealing with representatives of the Glens Falls Insurance Co. in trying to settle the case brought against me by Mr. *Jerz*."

If you have now retained this firm to represent you in the *Jerz* case and that is confirmed by the law firm above referred to, we will be glad to comply with your request.

Very truly yours,  
William L. Hadden

[DEFENDANT'S EXHIBIT NO. 16]

October 14, 1968

Mr. David G. Humphrey  
Box 128  
White Hall, Maryland 21161

Re: United Services Automobile Association; David G. Humphrey, Edward Jerz

Dear Mr. Humphrey:

Thank you very much for coming in to see us last Saturday. I just wish to put down in writing some of the things that we went over with you then.

There is no question that the United Services Automobile Association policy that you had in effect in February of 1962 provides coverage for any liability resulting from the accident of February 13, 1962. The extent of that coverage is determined by the limits of the policy that you then had.

The two questions that are causing delay and inconvenience here are these: first, whether the Glens Falls Insurance policy also provided coverage for the first \$25,000 liability incurred as a result of the accident; and second, whether the firm of Pouzzner & Hadden will continue to represent you in defending your interests in the pending lawsuit brought by Mr. Jerz. As far as we know, Mr. Hadden has not yet decided whether to try to withdraw from the defense of the lawsuit. This means that you should continue to co-operate with him and to make yourself available should the case go to trial. As soon as we hear of any developments on this, we will be sure to let you know.

On the basis of the matters that we discussed on Saturday, it seems to us that there is substantial question whether you are liable for the injuries to Mr. Jerz. We cannot reach any final conclusion or evaluation of Mr. Jerz's claim without either speaking to him, obtaining his deposition, or reviewing the investigation that has been made of the claim by Mr. Hadden's firm.

With respect to the question of whether you were driving Mr. Pierce's car with his implied permission at the time of the accident, we would want his side of the story before we reached any final opinion on that. Regardless how that is resolved, you are afforded adequate coverage for the pending lawsuit either with Glens Falls providing the first \$25,000 of coverage and United Services Automobile Association providing coverage in excess of that up to its policy limits or with United Services providing the sole coverage up to its policy limits. As to the question of defending your interests in this lawsuit, Mr. Hadden, on behalf of Glens Falls, had been providing that defense. We expect that he would choose to continue to provide the defense, but if he attempts to withdraw, we shall act to protect your interests.

In the meantime, we shall continue to urge Mr. Hadden to seek a reasonable settlement of the outstanding claims brought by Mr. Jerz in respect of the accident.

If you want clarification of any of the above, please let us know.

Very truly yours,  
Louis M. Winer

[DEFENDANT'S EXHIBIT NO. 17]

November 5, 1968

Mr. David G. Humphrey  
Box 128  
White Hall, Maryland 21161

Re: *Jerz v. Humphrey*

Dear Dave:

Larry reported your call Saturday, and I went to look at the papers in court yesterday. First, the claim has been \$100,000 all along. Your U.S.A.A. coverage goes that high, so you have no cause to worry on that account.

Second, as to the effect of the attempt to withdraw, I think the enclosed copies of letters explain our position. Wait a few days until we get a response or the court acts on the motion.

You and U.S.A.A. would be better off if the motion were granted, but for the reasons stated in the enclosures, we cannot jump in now and volunteer to defend. We really don't know how the defense stands with Pouzzner & Hadden.

The only way we can be sure that it's best if we appear for you is if the court forces it by granting the motion.

Give us a call if you have any questions. Please send us xerox copies of the letter and motion you just received. We'll let you know right away of developments here.

Cordially,  
Louis M. Winer

[DEFENDANT'S EXHIBIT NO. 17A]

November 5, 1968

United Services Automobile Association  
U.S.A.A. Building  
San Antonio, Texas 78215

Attention: Mr. Craig F. Ross, Senior Claims Attorney

Re: Claim No. 4-E-19 00 04-4

Policyholder: David G. Humphrey

Date of loss: February 13, 1962

Dear Mr. Ross:

We enclose a copy of a letter to Messrs. Pouzzner & Hadden. They have now moved to withdraw, and the letter indicates the current status of the matter. Their motion would normally come on for hearing on November 8. We have asked for a chance to confer with them about the pending cases before the motion is heard.

We shall keep you informed of the progress of the pending motion to withdraw. We have in mind your instructions in your letter of May 21, 1963, but we wish to call to your attention the opinion of the Connecticut Supreme Court in *Missionaries v. Aetna*, decided in 1967, a copy of which is also enclosed. We think the law set forth there makes the following recommendation both proper and advantageous to the Association.

If Messrs. Pouzzner & Hadden are permitted to withdraw, we recommend that we appear for Mr. Humphrey and either settle the claims against him or defend them through trial, whichever appears appropriate. Then, having either settled, suffered a judgment, or defended successfully, we recommend that an action be brought immediately against Glens Falls Insurance Company, in Mr. Humphrey's name, on two grounds (1) their breach of their duty to defend; and (2) their primary coverage afforded Mr. Humphrey. Under the *Missionaries* case, if Glens Falls now withdraws the defense they have already begun to offer, it

will be liable in full without regard to questions of coverage or limits of coverage.

Out of courtesy to fellow members of the local bar, we have gone as far as we can toward warning Messrs. Pouzzner & Hadden of the hazards they are causing their clients' interests by attempting to withdraw now. If they persist in endangering those interests, we can see no other course to recommend.

We shall call to report further developments. Please let us know if you have any instructions contrary to the above proposal.

Very truly yours,

Louis W. Winer

[DEFENDANT'S EXHIBIT 18]

Pouzzner & Hadden November 18, 1968

Second National Bank Building  
New Haven, Connecticut 06508

Re: *Terz vs. Humphrey: Aetna Casualty & Surety Co. vs.*  
Attention: Clarence A. Hadden, Esq.

Dear Mr. Hadden:

Per your letter of November 11th, you stated that "We previously wrote you and sent you a copy of our motion to withdraw our appearance on your behalf in the above case. We advised you that the matter would be heard in the Superior Court here on November 8, 1968. The hearing was held and you did not appear, nor did anyone appear on your behalf. The motion was granted."

You also stated: "You are hereby advised that on Monday, November 18, 1968, we will withdraw our appearance. In order for you to be represented in the case so that you will receive notice of all proceedings therein, including its assignment for trial, there are several things that you can do: First, you can enter an appearance for yourself by writing to the Clerk of the Superior Court here at New Ha-

ven. Second, you can retain an attorney to represent you, who should file his appearance, or third, you can demand that Attorneys Tyler, Cooper, Grant, Bowerman & Keefe, who represent the United Services Automobile Association, carriers of the liability insurance on your own automobile, enter their appearance for you."

In your letter of March 29, 1963, referring to Paragraph 1, you state that there are two separate actions involved — i.e., 1) Edward Jerz vs. David Humphrey, and 2) Aetna Casualty vs. Humphrey and Pierce.

Am I to understand that you are withdrawing from *both* these cases or just the case of *Jerz vs. Humphrey*? Per Paragraph 1 of this letter, it would appear that the Court has granted a motion for you to withdraw in the case of *Jerz vs. Humphrey* only and by this letter, I am requesting you and authorizing you to turn the file pertaining to *Jerz vs. Humphrey* over to Attorney Louis Winer of Tyler, Cooper, Grant, Bowerman & Keefe.

Very truly yours,  
David G. Humphrey

P.S. Glens Falls still owes me the defense of *both* these law suits. Please notify me immediately of what steps you will take to protect my interests in both these cases. If you will look into the circumstances under which I drove Pierce's car on the date of the accident, you will find that these are not so clear as to permit you to withdraw as you have done without continuing to provide me a defense as you stated you would some five years ago.

David G. Humphrey

## TRANSCRIPT

### [Excerpts]

[5]

MR. HORTON: Next, your Honor, we filed a discovery request of the defendant, and I would call your Honor's attention to the answer to these questions. The date on which Glens Falls was put on notice of the accident was on February 27, 1962. And they were put on notice of the claim that Glens Falls had primary coverage of this accident on April 25, 1962. They retained counsel, Pouzzner & Hadden, on June 14, 1962.

[6]

MR. HADDEN: Give me that date?

MR. HORTON: June 16th, 1962

Glens Falls instructed Pouzzner & Hadden to enter an appearance on behalf of David G. Humphrey in the pending litigation on August 7, 1962.

They instructed Pouzzner & Hadden to withdraw their appearance on behalf of David Humphrey, approximately — I'm using their language now — November 11, 1968.

THE COURT: Are those answers to stipulated to, as provided by your adversary? Have you read them?

MR. HADDEN: They sound all right to me.

\* \* \*

[35]

BY MR. HORTON:

Q And what was the progress of the case on the trial list?

[ATTY. WINER]

A It came up in late 1967, and was pretried on January 16, 1968. And I looked at the file on January 31st, 1968.

Q Were you aware that the pretrial was going to be held before it was held?

A I was not.

\* \* \*

[37]

BY MR. HORTON:

Q All right, after observing the pretrial memorandum of Judge Grillo, what did you do after that, on this file?

[ATTY. WINER]

A Between January of 1968 and June of 1968 there are a couple of very informal conversations at the calendar call, about what was going to happen with this file. And at one point there was a brief conversation with all the parties, and another judge, while I was trying the case in Superior Court.

Q Who was involved in this, the people?

A Well, I remember David FitzGerald was there; I remember somebody was there from Mr. Hadden's office.

Q Who is David FitzGerald?

A He's now dead, may he rest in peace. And he represented the plaintiff.

And that was in about April of 1968.

I never had any call or other letter from Mr. Hadden's office. And in June I wrote to Mr. Hadden's office, which is the next piece of correspondence we have.

Q Do you have a copy of your letter to him, and his response to you?

A Yes, I do.

Q Can we have those, please? Can I have them both?

MR. HADDEN: I have no objection to those letters being put in evidence, your Honor.

[38]

MR. HORTON: Plaintiff's Exhibit 46, your Honor, is a letter from Mr. Winer to Mr. Hadden, dated June 5, 1968. Plaintiff's Exhibit 47 is a reply of June 7, 1968.

BY MR. HORTON:

Q When was the next communication, Mr. Winer, between you and Mr. Hadden's office?

A I wrote a letter to Mr. Hadden, Mr. Clarence Hadden, in response to his letter of June 7th, and my letter was dated August 8th, 1968.

Q And did he respond to that letter?

MR. HADDEN: I have no objection to it.

MR. HORTON: Your Honor, Plaintiff's Exhibit 48 is Mr. Winer's letter to Mr. Hadden, dated August 8th, 1968.

BY MR. HORTON:

Q Now, I am sorry, Mr. Winer. I cut you off. Was there a response to that letter from Mr. Hadden?

A Well, I did not get a letter back in response to that letter, no.

Q Did he call you?

A No.

Q After this time was there another group of letters, or was there court activity?

[39]

A Well, the next thing that happened was that this case was right at the beginning of the trial list, the beginning of the fall.

Q This is the fall of 1968?

A Yes. And Mr. Ciulla —

Q Who is Mr. Ciulla?

A Mr. Ciulla came with our firm in '68, in about February. He was an associate then. He is a member of the firm now.

And he and I at that point, that is in the fall of 1968, were assigned to this case. I was tied up on something else, and we had understood the case was going to begin trial at the very beginning of the fall term, in Superior Court. And Mr. Ciulla went over to watch the trial. But, in fact it didn't get started.

Q So I take it that Mr. Ciulla has personal knowledge, rather than you, as to what happened in court in the fall of 1968?

A That's right, he advised me what happened.

\* \* \*

[101]

BY MR. HORTON:

Q Now, Mr. Winer, did your firm appear shortly thereafter on behalf of Mr. Humphrey in this case?

A My recollection is we appeared in January of 1969.

Q And did you ask Mr. Hadden's office for the complete file for the defense of this case?

A Yes.

Q And did you receive the complete file?

A No.

Q And did you personally have any discussions with Mr. Hadden's office concerning this matter?

A I wrote him a letter — Mr. Ciulla went down to see him then, and that was it.

Q I take it Mr. Ciulla is the one personally familiar with this matter?

A Well, I was in touch with him by mail, and Mr. Ciulla actually went down to pick up the file.

[102]

Q Now, did you review the file that was received from Mr. Hadden's office in January of 1969?

A Yes.

Q Now was the defense of Mr. Humphrey — was your defense of Mr. Humphrey — let me ask you this way:

What did you do after receiving the file from Mr. Hadden's office?

A We did several things. We sought to have Glens Falls continue the defense, beyond what had been provided; we sought to implead Glens Falls as a third party defendant. And we —

Q Excuse me, may I interrupt at this point?

MR. HORTON: Let the record reflect that in Plaintiff's Exhibit 45, this motion to implead was denied by Judge Bogdanski in the Superior Court.

A (Continuing) We had a medical evaluation of the plaintiff, from Dr. Greenwald; and we tried to do some investigation. And I reviewed the file that we had, and prepared a report to Mr. Humphrey and to United Services.

Q Did you attempt to institute an action for a declaratory judgment against Glens Falls at this time?

A No.

Q Why not?

A It was too late.

[103]

Q What do you mean it was too late?

A Well, we had thought that we weren't going to get a result in a declaratory judgment action before the case was tried, and that is before the pending case was tried, and there was no point trying to bring a declaratory judgment action instead of waiting for the case to get tried, and then bring an action afterwards.

Q Did you have an attempt to have settlement negotiations with Attorney FitzGerald after you received the file?

A Yes.

Q And what happened with that?

A First of all Mr. FitzGerald was injured in the spring of 1969, as I recall, and that got in the way of settlement negotiations. And by the time the case came up for further pretrial discussions and settlement, settlement wasn't possible at the figures that had been discussed previously.

Q Why wasn't it?

A Judge Parskey took a view —

Q When did Judge Parskey take a view?

A Judge Parskey said he wouldn't let the case settle for less than \$40,000.

Q And when was this?

A This was in the fall of '69.

[104]

Q And was this just prior to the start of trial?

A About a month before.

THE COURT: Was this at a pretrial?

THE WITNESS: Yes.

THE COURT: You were present?

THE WITNESS: Yes.

THE COURT: Just for the record, had you made an offer at that time of settlement?

THE WITNESS: No.

BY MR. HORTON:

Q Did the plaintiff have a demand at the time of this pretrial?

A No.

Q With Judge Parskey?

A No.

Q Did you have any discussions thereafter with the plaintiff as to settlement?

A Yes.

Q And when?

A There were a few discussions before the trial started, and then after the trial started there were several discussions.

Q What discussions were there before the trial started?

A There were discussions about what the plaintiff [105] wanted, and Mr. Brandon was trying the case at that point—

THE COURT: Joseph Brandon?

THE WITNESS: Joseph Brandon, yes. And he wouldn't put a figure on it.

\* \* \*

[106]

BY MR. HORTON:

Q Mr. Winer, did Judge Parskey put a figure on the case for settlement, at the begining of the trial?

A No, he only said he would not recommend or permit a settlement for less than \$40,000.

Q When was the next time there were settlement negotiations during the trial, after the trial started?

A Over the weekend of November 8th.

Q Perhaps during these questions you may want to refresh your recollection with Plaintiff's Exhibit 62 for identification.

Now, during the course of the trial did Judge Parskey bring up the matter of the ad damnum of \$100,000?

A Yes.

\* \* \*

[109]

BY MR. HORTON:

Q Did Judge Parskey suggest that the ad damnum be raised during the trial?

[110]

A [Atty. Winer] Yes.

Q Yes. And did you communicate this remark of Judge Parskey to your client, Mr. Humphrey?

A Yes.

Q And did he have any reaction to this?

A Yes.

Q And what was his reaction?

A He was shocked.

Q And did you have any further discussion with him about this?

A Yes.

\* \* \*

[111]

BY MR. HORTON:

Q Excuse me, first of all, Judge Parskey's comments were related to Mr. Humphrey. What date was this? You may refresh your recollection, I believe, with that.

A [Atty. Winer] November 6th, 1969.

Q And what was the next fact that occurred concerning the ad damnum?

A Well, on that day Judge Parskey told us that he was going to suggest to the plaintiff to increase the ad damnum

to \$250,000, and that he would grant the plaintiff's motion for such an increase, in the middle of the trial. And we related that to Mr. Humphrey.

Q Did the plaintiff in fact make such a motion?

A Yes.

Q When did he make such a motion?

A My recollection is he made it twice during the trial.

THE COURT: What happened to it the first time? He moved for an amendment of the ad damnum?

THE WITNESS: Well, the first time that Judge Parskey suggested this to me —

[112]

THE COURT: That isn't the question. The question is when did the plaintiff move to amend the ad damnum the first time.

THE WITNESS: I don't recall whether he made the motion on Friday, November 7th, or —

THE COURT: Is the motion in the file? Would that refresh his recollection?

MR. HORTON: I believe it would, your Honor.

THE COURT: Why don't you find it and show it to him?

MR. HORTON: Perhaps while I am looking, you might refresh your memory with Plaintiff's Exhibit 62 for identification.

Yes, your Honor, let the record reflect that the motion is dated November 11th, 1969, to amend the ad damnum to \$200,000, and that the motion was denied the following day, on the 12th of November, by Judge Parskey.

There is no other written motion to amend the ad damnum in the file.

BY MR. HORTON:

Q Now, when did you say, Mr. Winer, that the suggestion had been made by Judge Parskey?

A At the close of the day on Thursday, November 6th.

[113]

Q And the motion was denied on November 12th.

Were there any further discussions after Judge Parskey's comment about raising the ad damnum, with the plaintiff's attorney?

A Yes.

Q And what was that? What were they?

A At that time the plaintiff wanted \$90,000 to settle. We were authorized to offer 45.

THE COURT: Did you offer 45?

THE WITNESS: Yes.

MR. HADDEN: Did you offer — what was the figure?

MR. HORTON: \$45,000.

BY MR. HORTON:

Q And did the plaintiff refuse \$45,000?

A Yes.

Q Were there any further settlement negotiations before the verdict came in?

A No.

\* \* \*

[150]

BY MR. HORTON:

Q Now, what was your relationship with Mr. Pierce before he gave the car to you to sell?

A [Plaintiff Humphrey] We were very close friends.

[151]

Q How long had you been very close friends?

A I would say eight to ten years.

Q Had he driven your car in the past?

A Yes.

\* \* \*

[159]

BY MR. HORTON:

Q Did you discuss this with anyone after this, after

[160]

you had been told this?

A [Plaintiff Humphrey] Yes.

Q Who?

A Mr. Winer and my wife.

Q And where was your wife?

A She was in Connecticut at the time.

Q All right. And did this have any effect on your health during this period, before the motion was denied?

MR. HADDEN: I object to that, your Honor. He's not a professional expert on affecting his health.

THE COURT: For what it is worth, the Court will allow it.

A It upset me terribly.

BY MR. HORTON:

Q Until I take it you were relieved when you found out that the motion was denied six days later?

A Of course.

Q Had you had any difficulty sleeping during that six day period of time?

MR. HADDEN: Objected to, your Honor. Leading, grossly leading.

THE COURT: What effect did it have on —

THE WITNESS: It was constantly on my mind, your Honor.

[161]

BY MR. HORTON:

Q Now, I show you this. This will refresh your recollection. Did you incur any expenses because of the trial?

A Yes.

Q And what were those expenses?

A I had automobile expense, and lodging, food, time lost away from my business.

\* \* \*

[162]

BY MR. HORTON:

Q State to the Court what you claim your expenses were because of the trial.

A [Plaintiff Humphrey] They came out roughly — I'm just adding quickly here — eight or nine hundred dollars during the period of the trial.

[163]

Q Was this memo to which you are referring, was that made up shortly after you incurred these expenses?

A Yes.

THE COURT: Any bills to support it? Do you have any bills to support them, any payroll checks to show you lost money, any evidence to support your claim?

BY MR. HORTON:

Q What is your business, Mr. Humphrey?

A I'm a sales engineer.

Q Where did you have to come to in order to testify for this trial?

A From Maryland.

Q Is that where you lived at the time?

A Yes.

Q Is that where you live now?

A Yes.

\* \* \*

[165]

Q [By Mr. Horton] These expenses you are claiming, are these expenses solely incurred in November 1969, to come up to the trial in the defense of the Jerz case?

A Yes.

Q And approximately how much was it for travel and lodging expenses, to come up to Connecticut for the week or ten days for the trial?

A Approximately \$500, \$600.

Q And the remaining amount is what?

A Time lost from business, and miscellaneous.

Q Now, were you employed full time at that time?

A Yes.

Q And whom were you a salesman for?

A The Sprague Meter Company in Bridgeport, Connecticut.

Q What was your weekly salary at that time, or your approximate weekly income?

A About \$300 a week.

\* \* \*

[210]

Q [By Mr. Horton] Have you been able to refresh your recollection last night concerning whether the roads were private or public in the area where you lived?

A [Plaintiff Humphrey] Yes, they were private roads. Within, I would say, a mile or two miles before you come to the public road.

\* \* \*

[215]

DIRECT EXAMINATION BY MR. HORTON:

Q Mr. Pierce, have you known Mr. Humphrey — how long have you known Mr. Humphrey, Mr. Pierce?

A Since approximately 1953.

Q And how would you describe your relationship with him, between 1953 and 1962?

A Very good.

Q Was it a personal relationship, or a business relationship?

A Personal.

Q And how often did you see him during that period, on what sort of basis?

A Oh, once a week or more.

Q And was there a period of time when you lived near him?

[216]

A Yes.

Q Where was that?

A When I lived in Sandy Hook and he lived in Monroe.

Q And did you on occasion drive his car and he your car?

A Yes.

Q And how often would this occur?

A That's a very difficult thing. Off and on, once a week.

\* \* \*

[219]

BY MR. HORTON:

Q Now, on the day that the car was brought to Mr. Humphrey's house, I take it it was to his house?

A [Mr. Pierce] Yes.

Q And where was his house?

A His house was in Tuttles Point, in the town of Guilford, I do believe.

Q And this is a beach area?

A It is a beach area.

Q And were you down there at his house?

A Yes.

Q And did you in fact turn the keys over to him?

A Yes I did.

Q And did you have a conversation with him at that time?

A Yes.

Q And what was the substance of that conversation?

A The substance of the conversation would be "I have

[220]

brought the car down for you" — he lived in an area of private roads that he could demonstrate it and at that time I took my plates off the car and told him it was uninsured, and "Be careful", and it was there to be used in that area.

Q Now, are those the exact words you used?

A I cannot remember the exact words.

Q Mr. Pierce, I show you Exhibit 28 and ask you if your signature is on it?

A Yes.

Q Is it on the first page also?

A Yes.

Q Could you kindly review that please, and then I would like to ask you a question.

(Pause.)

THE COURT: The witness has read the paper.

MR. HORTON: I'm sorry.

BY MR. HORTON:

Q Now, halfway down the first page, sir, I believe it says, does it not — perhaps you can read the sentence that begins "On or before February 2nd".

A I have "On or about February 3rd — February 2nd, 1962, I drove the 1953 V.W. to Humphrey's home."

Q Go ahead.

A "He was going to attempt to sell it for me. There was no agreement or arrangement between Mr. Humphrey

[221]

and I as to restriction of the car's use. The only arrangement was that I was to receive \$235 in the event he was able to sell the car."

Q Okay now, going back to the beginning of that, it says "I drove the 1953 V.W. to Mr. Humphrey's home."

Does this refresh your recollection on that subject?

A Well, this was much closer to the time, yes.

Q Then it does refresh your recollection?

A If I wrote it at this time then I did drive the car.

Q Now, going on further it says "There was no agreement or arrangement between Mr. Humphrey and I as to restrictions of the car's use."

Is that a correct statement?

A As far as it goes, yes.

Q What do you mean, as far as it goes?

A Well, I did take the plates off. He knew that the car was unregistered, and was not to be used off of that private area.

Q Now, did you say that to him?

A I do believe I mentioned the fact that the car was uninsured and unregistered, and not to take it away from there, because I was a little cautious about insurance, et cetera.

Q Do you specifically remember saying "Don't take it  
[222] away from there"?

A In those words — I would not say specifically I remember in those words. But in intent yes.

Q Well, you signed this piece of paper, sir, that says —

A We are talking, I believe that has arrangements as far as the sale of the vehicle, or agreements —

Q Could we read that sentence again? "There was no agreements or arrangements between Mr. Humphrey and I as to restrictions of the car's use."

Is that correct? And you are saying today that that is wrong, that there was a restriction as to the car's use?

A I would say it would be an implied restriction that with my plates taken off of it, and the car unregistered, that he should know better. Or he would assume it upon himself if he took it off the private property.

Q By implied do you mean that you didn't specifically tell him, but you assumed that he knew it by himself? Is that what you mean by that?

A Yes.

Q Now you are saying you didn't specifically tell him something about restriction of the use — or what are you saying? You just sort of assumed he would know?

A When I took my plates off and told him it was un-

[223]

registered and uninsured, I assume he has a mind, and he can think, too.

Q I understand that. What I am saying, as far as what you told him, what you specifically said through your mouth, was it unregistered? Did you say that?

A Yes.

Q You do recall saying that?

A Yes, he helped me probably to take the plates off.

Q Go ahead.

THE COURT: We have got to be careful about "probably said something". You are looking back at it; the only thing the Court can consider, that this happened or it didn't happen, specifically. You can say "I don't remember; it is so long ago I can't remember." But, don't say "I must have done so and so", because that's not evidence.

THE WITNESS: Fourteen years is an awfully long time to remember verbatim. That is what I am trying to get out.

THE COURT: I understand.

BY MR. HORTON:

Q The thing I am interested in, sir, is that you did sign this, and it is dated April 5, 1962?

A Yes.

Q Do you recall — not necessarily the date, but do you [224] recall signing this shortly after the accident?

A Yes.

Q And do you recall reading this over before signing it?

A Yes.

Q Do you recall this sentence: "There was no agreement or arrangement between Mr. Humphrey and I as to restrictions of the car's use"?

A Again it is an implied — as I stated, with the plates, the license plates off, and living on a private area, I assumed that it was going to be used in that area.

Q I understand what you assumed.

A Yes, but I mean, besides that —

Q Besides that you cannot, the only thing you can recall telling him — is this correct — the only thing you can recall

telling him, specifically telling him, was that the car is unregistered? You can remember saying that?

A Yes.

Q And I am asking you if you can specifically recall telling him that he is only to use it in this, you know, on private roads, or whatever you said?

A I cannot remember.

\* \* \*

[226]

Q [By Mr. Hadden] Now, let me ask you this: Did you expressly or impliedly, when turning this car over to Mr. Humphrey, give him your permission to drive this unregistered and, you say, uninsured motor vehicle, on a public highway in the State of Connecticut?

A [Mr. Pierce] No.

\* \* \*

[233]

Q [By the Court] How many times had he driven your car or you driven his car, previously, and under what circumstances?

A [Mr. Pierce] Well, we had problems with cars now and then, so I would drive his various times, say on an average once a week. And he would drive mine.

[234]

Q That's when you lived where?

A In Sandy Hook. I would go over to his place and we'd drive to the hardware store, or places — one would use one or the other car.

Q You lived close by?

A I was a matter, I think, of ten miles away.

Q How did you get to his house to drive to the store, to use the car?

A I would drive mine over, then we'd either use his or mine, or he would drive.

Q Oh, I see. In other words, it was a matter of mutual convenience on that particular occasion that you used it, at one or the other's home?

A Right, right.

Q And on those occasions usually he went with you, or you went with him?

A It varied.

Q Is that correct? You went to the store together?

A Um-hum.

Q You never previously loaned him a car for a long period of time for his general use, exclusive use, so to speak?

A No.

Q And he had never previously loaned you a car for an exclusive use over a period of time?

[235]

A No.

Q Except for going to the store and back again?

A No. Maybe there would be a time I would use his for one day and he'd use mine for one day. But not for what you would consider a long period of time.

Q How long prior to this incident had this occurred?

A Well, we were doing this off and on for years.

Q But that was when you lived —

A In Sandy Hook.

Q Sandy Hook?

A Yes.

Q When did you leave Sandy Hook?

A I left in 1965.

\* \* \*

[238]

DIRECT EXAMINATION BY MR. HORTON:

Q Mr. Humphrey, you heard this testimony, I believe. When did you move to Guilford, from Monroe?

MR. HADDEN: What was that question, please?

(Pending question read back.)

A I believe it was about the time that Mr. Pierce mentioned approximately around '61.

BY MR. HORTON:

Q So you lived in Guilford for approximately one year before this accident occurred; is that correct? Or is that not correct?

A We owned a house in Monroe and purchased another house at Tuttles Point. Mr. Pierce helped me put in a heating system. We put in new roofing. And he was down there quite a bit working with me in fixing up the house that we had purchased in Tuttles Point.

In the course of working on the house, if we had to go down to the lumber yard to purchase lumber he'd take my microbus, or if I had to get a bag of nails I'd take his Volkswagen sedan.

So, during the period he was commuting, and he'd stay over weekends with us, and work, and go back with his

[239]

family during the week to Sandy Hook.

we did have the exchange of vehicles.

\* \* \*

[241]

DIRECT EXAMINATION BY MR. HORTON:

Q Mr. [William] Hadden, in accordance with the Judge's request, could you tell us what your occupation is, sir?

A I'm a lawyer.

Q Yes and how long have you been an attorney?

A I was admitted to the bar in December 1917.

Q And what firm are you with, sir?

A Presently I'm with the firm, in New Haven, known as Hadden, Taylor and Knott.

Q How many people are in that firm? How many lawyers in that firm?

THE COURT: I think we could say as a matter of common knowledge we can conclude, and everyone will agree, that Mr. Hadden is a person of broad experience in the field of law. And certainly well-qualified to express any opinion, if an opinion is in order — or a custom, that you might attempt to introduce.

[242]

MR. HORTON: Thank you, your Honor.

BY MR. HORTON:

Q Now, Mr. Hadden, do you and your firm engage in a large amount of tort litigation on behalf of insurance companies?

A A considerable amount, yes.

Q And have you ever been retained by an insurance company to represent an insured, where the insurance company was reserving its rights as to coverage?

A Yes.

Q And in your experience approximately how many times have you personally been involved in that?

A It would be pretty speculative, but I would say numerous times, I would have to say.

Q All right. Are you familiar with the customary practices among attorneys in Connecticut, and especially in New Haven County, concerning when reservation of rights letters are supposed to be issued?

A I'm not familiar with it because I don't believe there is any such custom or practice.

Q In fact do you have any custom or practice as to when they are supposed to be sent out?

A It depends on the fact of the particular situation that we are dealing with.

Q All right. Now, under what factual situation should [243]

a reservation of rights letter be sent out, at or before the time a firm enters an appearance on behalf of that insured?

A Well, I think, sir, it has to be determined if a reservation of rights letter should be sent out. And then once it is determined, it has always been my understanding that it is done within a reasonably short time.

Q But you know of no customary practice in which it is supposed to be done before the firm enters an appearance on behalf of the insured?

A I most certainly do not. There is no such custom.

\* \* \*

[246]

Q [By Mr. Horton] Have you ever, sir, been retained by an insurance company to represent an insured, where there was primary and excess coverage?

A [Atty. Hadden] I don't recall specifically, but I must have been.

Q On more than one occasion?

A I would say probably several. But if you ask me

[247]

when and by what company, and what cases, I couldn't tell you.

Q I am not asking you that. I am asking you whether you had experience with repre~~senting~~ companies, or repre-

senting insureds in cases where there was primary and excess coverage.

A I am sure I have.

Q And have you represented insureds, or insurance companies in such situations where there was a question of coverage by the primary or the excess insurer?

A Yes, I have.

Q And are you familiar with the customary practices of attorneys in the New Haven or Hartford area, concerning whether the excess — and at what times the excess carrier will enter an appearance on behalf of the insured?

A I'm not familiar with it because there is no existing custom that I know of.

Q Are you saying that the custom is that it can go either way or are you saying —

A I say there is no custom that I know of. And when you talk about primary and secondary coverage, do you mean in a case where, for instance, the ad damnum is \$100,000, and the primary coverage is \$25,000, and there is another policy for \$100,000 which is excess?

Do you mean when and in that event would that excess company enter an appearance in such a case?

If you do, I can answer you.

[248]

Q Yes.

A They'd enter it on or before the return day of the writ.

Q The excess carrier?

A Yes both carriers would enter, where the ad damnum exceeds the primary coverage.

Q I thought you said that earlier, Mr. Hadden, that there was no custom?

THE COURT: You are talking about two different things.

MR. HORTON: I'm sorry.

THE COURT: In one breath you are speaking about excess coverage and in the other is the reservation of rights. And there are two different areas.

So you will be confused if you proceed in that —

BY MR. HORTON:

Q Let's separate them out, Mr. Hadden. Is there a custom among insurance company attorneys, or companies that are retained — attorneys that are retained by insurance companies, concerning a situation where the primary coverage is inadequate, and there is excess coverage?

Are you familiar with the practice among attorneys in that situation, as to whether the excess carrier enters an appearance?

[249]

A I hesitate to characterize the custom as a custom of attorneys. The attorneys usually do as directed by the company.

And I will say that to the best of my knowledge it is the custom in the situation such as you have just described, for the companies, each of them, both of them, to require an appearance on or before the return day of the writ.

Q Now, is this based on your being involved in such cases, or what is the basis of your opinion?

A It is based on what I believe has been my experience in the situation.

Q Can you recall situations in which you have been hired by an excess carrier in such a situation to file an appearance in a situation, in such a situation?

A Specifically, no.

Q Can you recall a situation in which the contrary was the case, where you did not enter an appearance on behalf of the excess carrier?

A Never. And I am limiting that now to when the ad damnum in the complaint exceeds the primary coverage.

Q I'm sorry. I didn't hear you.

THE WITNESS: Would you read it back?

(Last answer read back.)

[250]

BY MR. HORTON:

Q Now let's take the other situation that Judge Clarie indicated; the situation in which the primary carrier is reserving its rights.

Do I need to go through the question again? What is your opinion as to that as to the customary practice among attorneys concerning whether the excess carrier enters an appearance when the primary carrier is reserving his right?

A What is the practice in regard to what?

Q As to whether the excess carrier enters — the customary practice as to whether the excess carrier enters an appearance when the primary carrier is reserving its right?

A I can't answer the question because I don't know that I have ever had that experience, or known of an experience where the primary carrier was reserving rights, and there was an excess policy involved. To be truthful, I can't recall I ever was confronted with that exact situation. I'll have to plead ignorance on that.

\* \* \*

[251]

BY MR. HORTON:

Q It is clear in this case, Mr. Hadden, that a reservation of rights letter was not sent until eight months after your firm entered an appearance.

A If that isn't clear then nothing in this case is clear.

Q Okay, fine. Now, my question is, is it customary for attorneys for the excess carrier, in determining whether or not to enter an appearance, to rely on the fact that the primary carrier has not reserved its right at the time that the primary carrier entered an appearance on behalf of —

A No, it is not. Not when the primary carrier's policy is much less than the ad damnum, and the damages claimed in the writ.

\* \* \*

[252]

Q [By Mr. Horton] Now, in what situations would you consider it customary not to send out a reservation of rights letter until sometime after the attorney had entered an appearance on behalf of the insured?

A [Atty. Hadden] Could I have that question reread, please?

(Pending question read back.)

A Well, I have to say to you, Mr. Horton, I know of no custom. Therefore I can't say whether it is customary or not customary.

I know of no existing custom covering that situation.

\* \* \*

[253]

BY MR. HORTON:

Q You consider eight months to be a reasonable period of time?

A If you are talking about this case I would say yes.

\* \* \*

BY MR. HORTON:

Q Now, Mr. Hadden, I show you Plaintiff's Exhibits 25, 26 and 27 and 28, which I assume you are well familiar with.

MR. HORTON: Your Honor, these are the three state-

[254]

ments by Mr. Humphrey, and the one statement by Mr. Pierce, all of which apparently were taken shortly after the accident, within a month after the accident.

BY MR. HORTON:

Q You are familiar with those statements, I believe?

A Generally, yes.

Q Now, would you say in your professional experience, that based on these four statements, that Glens Falls Insurance Company had sufficient information on which to decide whether or not to reserve its rights as to coverage?

A I would say that based on those statements Glens Falls had sufficient information to determine that there probably was no coverage as far as Mr. Humphrey was concerned.

\* \* \*

[255]

BY MR. HORTON:

Q I take it then that Glens Falls knew there was a coverage question within a month after the accident?

A I would assume so, because reading those things I certainly would know it. And I assume somebody in Glens Falls knew it, too.

\* \* \*

Q Mr. Hadden, do you know of any custom among New Haven or Hartford attorneys, concerning whether a firm enters an appearance on behalf of an insured and defends him for six years, as to whether it is a customary practice for that firm to withdraw its representation of that person when there is no other firm that has indicated that it will appear on behalf of that person?

THE COURT: You are getting into the merits of this case now, Counselor, on the merits and demerits.

MR. HORTON: Well, perhaps I can make it more general.

THE COURT: Do you want to be bound by his answer?

MR. HORTON: Maybe I can make it more general,

[256]

your Honor.

THE WITNESS: I will answer the question.

BY MR. HORTON:

Q Fine, please do.

A I would think that probably it is a custom that when counsel have appeared at the direction of an insurance carrier because the allegations of the complaint in the case in which they have appeared sets forth a case, which if proven is covered by the policy, in the first place, that subsequently when all of those allegations, which if proven would have shown a situation of policy coverage, are removed from the complaint, and the named assured is dropped as a defendant, I would say — and I don't think it is a custom, sir — I think the action that we took under those circumstances would be the same that any other competent attorney or firm of attorneys would have taken.

But there is no custom because that situation doesn't arise frequently enough to have a custom formulated.

\* \* \*

[293]

BY MR. HORTON:

Q What did you do, Mr. Ciulla [Atty. Winer's Associate]?

A I went to the Superior Court in New Haven, at the request of Mr. Winer, to attend the trial of the Jerz and Humphrey case.

Q And did you attend that pretrial [in September, 1968]?

A Well, I went to attend a trial. When I arrived there it turned out that there was a conference that was going on, before Judge Grillo.

Q Who was at that conference?

A Well, I saw enter the chambers for the conference Mr. Hadden, Mr. Fitzgerald, and I think Mr. Tiernan, Bill Tiernan, who was with David Fitzgerald's office at that time, with David Fitzgerald.

Q Did you enter the chambers of Judge Grillo at that time?

A I did not.

Q Why did you not?

A Well, I asked to be admitted to the conference and Mr. Hadden pointed out to me that I did not have an appearance in the case and he asked if I wanted to file one

[294]

at that time. And he said as long as I didn't have an appearance I had no right to be there. And I did not press the point.

[295]

BY MR. HORTON

Q Mr. Ciulla, did there come a time in January 1969 when you went to the office of Pouzzner & Hadden?

A Yes.

Q What was the purpose of that?

A My purpose was to pick up the file in the case.

Q All right. And did you go over there?

A I did.

Q What in fact happened there?

A Well I arrived and I was ushered in by the secretary.

[296]

Then after a short period of time I went into the office of

Mr. Clarence Hadden, and he was in his office with another lawyer who was with the firm at that time, named Mr. Mezzanotte, John Mezzanotte.

THE COURT: Messanotte?

THE WITNESS: Mr. John Mezzanotte —  
M-e-z-z-a-n-o-t-t-e.

MR. HORTON: It shows here on Plaintiff's Exhibit 56, I believe.

A (Continuing) And I said that I was there to seek — I was instructed to go and ask for the file that that office had on this matter.

And it was a very cordial session, but I was politely told that I was able to get a limited number of items from the file, which were in the form of a folder, and the carbon copy was — I signed the original receipt, which listed the items in the file — and I received a carbon of that.

And my recollection is that I looked quickly through to make sure that I indeed was getting, in fact getting these — these checks are what I did when I obtained the file, to make sure all those items were in the file.

BY MR. HORTON:

Q I show you Plaintiff's Exhibit 56, or I have shown you Plaintiff's Exhibit 56, and I take it this is a copy of the

[297]

document that you signed for Pouzzner & Hadden?

Q That's correct.

Q Now did you in fact ask for the entire file at that time?

A I did.

Q And did you in fact see a file of Jerz versus Humphrey at that time?

A I saw the file from which Mr. Hadden and Mr. Mezzanotte were dealing, which was on Mr. Hadden's desk at that point.

Q Okay. And what was the size of that file?

A It was a substantial file, as I recall, in a tan envelope.

MR. HORTON: Your Honor, may the record reflect that his hands are approximately one foot apart?

MR. HADDEN: I thought they were about two feet apart.

THE WITNESS: I think it is one foot.

THE COURT: Very well.

MR. HADDEN: He can ask him how wide the file was, if it is important.

MR. HORTON: Fine.

BY MR. HORTON:

Q Would you care to say how wide the file was?

A I could give a best estimate between six inches and nine inches wide.

[298]

And how wide was the part of the file that you were in, Mr. Ciulla?

A I was given —

MR. HADDEN: That is objected to, Your Honor, because we have a list of the documents that he was given. So it is immaterial what their width or length was.

MR. HORTON: I think it is important to show that the insignificance of the amount of file that was turned over to U.S.A.A. in January.

THE COURT: It is harmless. It isn't going to impress the Court one way or the other.

THE WITNESS: It was a manila folder, approximately one and a half inches or so.

BY MR. HORTON:

Q Now, were you present at the trial of the case of Jerz versus Humphrey, in the fall of 1969?

A Yes.

Q And what was your purpose?

A My purpose was to assist Mr. Winer in whatever way I could, in terms of research, taking witness notes, attend the trial.

Q Now, were you or he — you or Mr. Winer more closely dealing with Mr. Humphrey during the trial?

[299]

A I think during the trial I probably saw more of Mr. Humphrey, because Mr. Winer was directly in charge of the preparation of trying the case.

Q Now, did you have an opportunity to observe Mr. Humphrey between the time — first of all, did you and Mr. Winer inform Mr. Humphrey of Judge Parskey's opinion that the ad damnum of \$100,000 was too low, immediately after Judge Parskey made his remarks?

A Yes.

MR. HADDEN: I won't object, but I think he might ask questions properly.

MR. HORTON:

Q You may answer the question.

A Yes.

Q Did you observe Mr. Humphrey from the time he was given this information until the time that Judge Parskey denied the motion to raise the ad damnum?

A Not during the entire night. I observed him during the conference, and then at some point we all went home. I did not see him during the entire evening, until the next morning.

Q But you did observe him at various times during that period; is that correct?

A I observed him during our conference, and until that conference ended. Then I observed him in the morning again, before we went in to talk with Judge Parskey.

[300]

Q What did you observe about him in terms of his reactions and in terms of questions he had to your response?

A Well, Mr. Humphrey was a somewhat high-strung person, anyway, I would say, and was concerned about the case.

MR. HADDEN: That is highly —

THE COURT: It may be stricken. It is not responsive. What did you observe?

THE WITNESS: Well, I observed —

THE COURT: Did he smile, or make faces, or show anxiety?

THE WITNESS: He showed anxiety. Verbally, more than any other way.

BY MR. HORTON:

Q Did he make comments about his assets?

A He asked many questions about what the significance of an increase in the ad damnum would be in terms of his assets and his personal affairs.

MR. HORTON: I have no other questions.

CROSS EXAMINATION BY MR. HADDEN:

Q Were you the one that informed Mr. Humphrey of Judge Parskey's statement, re increasing the ad damnum?

A My recollection is that both Mr. Winer and I informed him.

[301]

Q How long was it from that time until Judge Parskey stated that he would not permit an increase in the ad damnum?

A My recollection is that the initial conference was in the late afternoon, when Judge Parskey talked to Mr. Winer and I privately about the increase. We then immediately informed Mr. Humphrey, and talked to him at some length.

The next morning Judge Parskey, right before ten o'clock or so informed Mr. Winer and I — and Mr. Brandon, who was trying the case at that time, that not only wouldn't he entertain a motion for an increase in the ad damnum, but he would deny it if one were made.

Q So the period of time when conceivably Mr. Humphrey could have been worried that the ad damnum would be increased, beyond his insurance coverage, was overnight?

A That's not correct.

Q Why not?

A Because we informed Mr. Humphrey of Judge Parskey's chambers' position. But we also informed him that Mr. Brandon had indicated that he was going to press his motion at a later time.

And we at that point did not guarantee Mr. Humphrey that the Court was going to follow its instincts on the second day, as opposed to what they were on the first day.

Q You did, I assume, tell Mr. Humphrey on the day it occurred that Judge Parskey had said he was abandoning

[302]

or withdrawing his suggestion that the ad damnum be increased, and that he had changed his mind, and if an application were made to increase the ad damnum he would deny it?

A We did.

Q That substantially is what Judge Parskey said the first thing in the morning, on the day following his previous remarks about permitting it — which was in the late afternoon of the day before; is that right?

A That's correct.

Q And then you still told Mr. Humphrey that despite what Judge Parskey said, that he had changed his mind — didn't he say he realized he was in error in saying he would grant an increase at that time; it was the wrong decision? Didn't he say that?

A He didn't say that he had been in error, because there was no decision made. I think what he said was he had decided that what he had done in talking to us in private, and making those comments, was something that he wished he hadn't done, and was improper under the circumstances.

He didn't say anything about legal error — that is the way I interpreted your question.

Q I didn't ask about legal error. Didn't he say that "if a motion is made by the plaintiff I will deny that motion"?

A That's what I told Mr. Brandon that morning.

[303]

Q Yes. And you told Mr. Humphrey that he had said that?

A That's right, I told Mr. Humphrey that he said that. But what I said was I also told Mr. Humphrey that Mr. Brandon did not at that point in the conference say "I'm going to drop any motion to amend".

As a matter of fact, he indicated he was going to make one at that point.

Q Did you also tell your client, Mr. Humphrey, that there was no way that Mr. Brandon could amend the ad damnum clause without securing the permission and approval of the Judge?

A I'm sure we did.

Q Now, that time when you came over to our office do you recall that when the documents which were to be turned over to you were exhibited to you, that there was another document that you requested specifically, naming what it was?

A To the best of my recollection I requested the entire file. But I also —

Q Could you answer my question?

A I'm trying to do the best I can.

Q Please do.

A All right, I will.

I think I asked for the entire file and I think I placed particular emphasis on the evaluation that your office

[304]

might have made of the case.

Q Let me ask you this, sir: Wasn't there one document that you wanted, that they told you they needed to dig out of the file, and have to make a copy of it; you could either wait or you could go out and come back? And you went out of the office and came back and picked it up when that document had been prepared?

A I don't recall that.

Q You don't recall that?

A In fact I recall waiting for some time for these documents while they were being copied.

Q You do know, don't you, that shortly thereafter your office was furnished with a copy of a letter from Mr. Clarence Hadden to Glens Falls, which touched on the subject of evaluating the claim?

MR. HORTON: Your Honor, there is a letter in the file —

THE COURT: Let him answer the question.

MR. HADDEN: Let him answer the question, please. I am not asking you.

A I vaguely remember that we did obtain some additional material after that, before the trial.

BY MR. HADDEN:

Q Having to do with the evaluation of our office, to Glens Falls?

[305]

A I believe so.

\* \* \*

[309]

[BY MR. HADDEN]

Q In your visit to the courthouse in September of '68

[310]

in your visit to the courthouse in September '68, is that what you said was your first activity in connection with the Jerz and Humphrey case?

A [Atty. Ciulla] The best I can recall, yes.

Q And you weren't directed to go to the courthouse to take part in a pretrial, were you?

A No.

Q Your instructions at that time were to observe a trial which was scheduled to go forward; is that right?

A That's correct.

Q Then why, if you — why did you want to attend the pretrial?

A Well, the instructions were also to find out generally what was going on. And once I saw that there was going to be a conference on it I wanted to be able to report as to the discussions that were going on.

Q And you say I was there?

A The best I recall.

Q And that I objected to you being there?

A My recollection is that you objected to my entering the chambers of Judge Grillo.

Q What did I say? If I said it to you at that time?

A Well I think what you said was something along the lines that I had no appearance, and I have no right to be there. And I think you offered me the opportunity to file

[311]

an appearance if I wanted to, if I wanted to attend.

Q And what did you say?

A That I wasn't authorized to do that.

Q I can't hear you.

A I said I hadn't been told to do that.

Q And you never at any time appealed to Judge Grillo to be permitted to come in to the pretrial session, did you?

A I didn't press the point, no.

Q Did you ever at any time appeal to Judge Grillo to be permitted to attend the pretrial session? You never did?

A No.

Q I can't hear you.

A The answer is "No".

\* \* \*

[329]

BY MR. HADDEN:

Q All right. Is it so, sir, that Judge Parskey, in conference with you, in the absence of plaintiff's counsel, concerning his position on increasing the ad damnum clause, and his statement to you that he had changed his mind, and would not recommend an increase in the ad damnum clause, and if the plaintiff moved for such an increase he would deny the motion — was separated by late afternoon and early morning of the next day?

A [ATTY. WINER] Yes.

Q Is that correct? And I take it that you or your associate advised Mr. Humphrey of both of those statements of Judge Parskey?

A Yes.

\* \* \*

[333]

DIRECT EXAMINATION BY MR. HORTON:

Q Mr. FitzGerald, where did you go to college?

A The University of Connecticut.

Q And when did you graduate there?

A I received my degree there in 1951.

Q And what was your degree in?

A Bachelor of Arts.

Q And did you then go to law school?

A I did.

Q And where did you go to law school?

A The University of Connecticut School of Law.

Q And when did you graduate from there?

A 1953.

Q And did you become a member of the Connecticut Bar?

A I did.

Q And when was that?

A 1953.

Q And have you been a member of the Connecticut Bar since that time?

A Yes, sir.

[334]

Q And what firm have you been with since 1953?

A When I joined the firm it was Davis, Lee, Howard

& Wright. The firm is now known as Howard, Kohn, Sprague & FitzGerald.

Q How large is this firm?

A At present we have seven partners, one associate, and one law student, who is a clerk.

Q And what is your position in the firm?

A I'm a partner.

Q And what percentage of your firm's time is spent in tort litigation?

A Of the firm time?

Q Of the firm time?

A Oh, I would say something in excess of 50 percent.

Q And what is the percent of your time, your personal time, in tort litigation?

A I would approximate around 80 percent of my time.

Q And in what counties in the State of Connecticut does your firm practice law?

A I would say in every county.

Q And what about yourself?

A The same.

Q Have you specifically been engaged in practicing tort litigation in New Haven County?

[335]

A I have.

Q And in Hartford County?

A Yes, sir.

Q Have you written any books on the subject of tort litigation?

A Yes, sir.

Q And what is that?

A I am co-author with the Honorable Douglass B. Wright, of the Connecticut Law of Torts, which is now in its second edition.

Q Is that this book?

A Yes, sir.

Q Is this a standard reference book for Connecticut attorneys, concerning tort litigation?

A So I am told.

Q Do you have any teaching positions at this time?

A Yes, sir.

Q And what is that position?

A I am lecturer in law at the University of Connecticut School of Law.

Q What do you lecture in?

A At the moment, trial practice.

Q Have you lectured in torts?

A Yes, sir.

Q And over what period of time have you lectured in

[336]

torts?

A Well, between 12 and 15 years. I'm not exactly sure of the precise dates that I handled the torts program.

Q At the University of Connecticut School of Law?

A Yes, sir.

Q What insurance companies does your law firm represent on behalf of tort defendants, at the present time?

A At the present time? There are 17 of them.

Q Could you list them?

A The Allstate Insurance Company —

MR. HADDEN: Your Honor, are we interested in the present time, or are we interested back in 1962 and '63?

MR. HORTON: Your Honor, I am trying to qualify him as an expert in the subject of tort litigation, in dealings with insurance companies.

THE COURT: But do we need to name them? Seventeen companies?

MR. HORTON: Seventeen companies, right.

BY MR. HORTON:

Q Do these include large companies?

A Yes, sir.

Q Such as what large companies?

A Well, the Liberty Mutual Insurance Company, the Allstate Insurance Company, I think would qualify as large

[337]

ones.

Q Let me ask you this: Has your firm — does your firm now, or has your firm at any time represented clients on behalf of the United Services Automobile Association?

A No, sir, I do not believe so.

Q Does your firm now, or has your firm at any time in the past represented any insured, or represented the insurance company directly on behalf of Glens Falls Insurance Company?

A No, I do not believe so.

Q Have you, Mr. FitzGerald, ever been retained by an insurance company to represent an insured, where the insurance company was reserving its rights as to coverage?

A Yes, sir.

Q And on how many occasions have you done so?

A Many, I would say.

Q Have you ever been retained by an insurance company to represent an insured, where there was primary and excess coverage?

A Yes, sir.

Q And how many times have you done that?

A Well, they would also be numerous times.

Q In such situations have you represented the primary carrier, in such situations?

A Yes, I believe I have.

[338]

Q And have you represented the excess carrier in such situations?

A Yes.

Q And have you represented the plaintiff in such situations?

A Yes, I can think of one instance where I represented a plaintiff in such circumstances.

Q Have you or your firm been involved in such cases where the primary carrier was reserving its rights as to coverage?

A Yes, I can think of such a case also.

\* \* \*

[339]

BY MR. HORTON:

Q [Atty. FitzGerald] Is there a customary practice of Connecticut attorneys and insurance companies who retain them concerning when reservation of rights letters are sent to insureds?

A Yes, sir.

Q Are you familiar with that customary practice?

A Yes, sir.

Q And what is that customary practice?

A I wonder if I could hear the question again? Was it the reservation of rights letters?

Q We are talking about the reservation of rights letters. We are not talking about an excess letter at this time.

A Well, the practice is to notify the insured as soon as the judgment by the insurer is made that there will be a

[345]

reservation of rights.

Q Is it a customary practice in any situation to send out the reservation of rights letter after the attorney hired by the insurance company has entered an appearance on behalf of the insured?

A I'm not sure I understand.

THE COURT: Read it back, please.

(Pending question read back.)

THE WITNESS: I'm sorry. I don't understand the question.

BY MR. HORTON:

Q I will rephrase the question.

I believe you said, Mr. Fitzgerald, that the customary practice was to send out the reservation of rights letter as soon as the facts are known upon which the reservation of rights could be made; is that correct?

A Yes, that's what I said.

Q Now, by saying that you did not pin it down to a particular time before or after the appearance is entered on behalf of the insured?

A Well, I don't think that makes any difference.

Q All right. Now, assume, Mr. Fitzgerald, that the information upon which such a decision can be made is known prior to the time the attorney enters an appearance on behalf of the insured. What is the customary practice

[341]

as to whether it should be sent out at or before the time the

defense attorney enters an appearance on behalf of the insured?

A Well, it should be sent out at the time the information becomes known, without regard to whether there is a suit or whether an attorney has appeared or hasn't.

Q Now, are you familiar — first of all, is there a customary practice of Connecticut attorneys concerning whether the attorney or the insurance carrier sends out the reservation of rights letter to the insured?

A Yes sir.

Q And are you familiar with that customary practice?

A I am.

Q And what is the customary practice?

A The insurance company sends the letter.

Q In what situations would an attorney send out such a letter?

A Well, if the attorney were retained to represent the insurance company in connection with its legal rights and obligations, then the attorney might send the letter.

But in the situation where the attorney is retained to represent the insured, the letter should come from the company, not from the attorney who appears for the insured.

\* \* \*

[344]

BY MR. HORTON:

Q Is there a customary practice as to whether such attorneys will discuss the issue of the reservation of rights letter in any way with the insurance company?

MR. HADDEN: That's objected to.

THE COURT: It is a very confusing question, Counselor. Read it back so that counselor can hear his question.

(Previous question read back.)

THE COURT: I know what you mean, I just —

THE WITNESS [Atty. FitzGerald]: The answer is yes.

THE COURT: Certainly.

[345]

BY MR. HORTON:

Q And what sort of steps is the customary practice for such an attorney to do?

A I would say the exhibit you just showed me is fairly representative of the customary practice.

Q Fine. That is Plaintiff's Exhibit 65?

A Yes, sir.

Q Now, Mr. FitzGerald, is there a customary practice of the Connecticut attorneys, and the insurance carriers who retain them, concerning whether an excess carrier enters an appearance on behalf of the insured, if the primary carrier has already done so?

A Yes, I think there is a customary practice.

Q And are you familiar with that customary practice?

A I am.

Q And what is that customary practice?

A I would say the practice is to avoid multiple appearances for defendants, if possible, under the circumstance of any given case.

Q And what is the reason or reasons for that, Mr. FitzGerald?

A Multiple appearances in tort litigation raise questions as to the purpose of the multiple appearance, and make prominent the question of the underlying insurance relationship with respect to a defendant.

[346]

And that is not a good thing to inject into any tort litigation, it can be avoided.

MR. HORTON: Thank you very much. I have no other questions.

THE COURT: It is now 11:30. We will take our usual recess.

(Recess.)

CROSS EXAMINATION BY MR. HADDEN:

Q Mr. FitzGerald, on your statement that multiple attorneys representing a defendant, that they might in effect prejudice the defendant before a jury in some way; is that in substance what you said?

A It has that potential.

Q Now, you think if there were two attorneys, each representing a defendant, that that would result in — in other words, "A" files a lawsuit against "B" and "C", and a firm comes in and has their appearance for "B", and another firm comes in and has their appearance for "C"; you think that would make the result that naturally all defense attorneys try to avoid?

A Where there are two separate defendants, and one attorney for each defendant?

Q Yes, yes.

A No, I don't say that it applies to that situation.

Q In any event, the only prejudice would be created

[347]

would be when the case is reached for trial and the jury would then see the multiple attorneys; there could be no prejudice before that, could there?

A Well, the one you state, Mr. Hadden, is the one I had in mind. Whether there could be any prejudice before that, I see very little likelihood there would. Yes, I agree with you.

Q You think in a trial to a Court that multiple attorneys would influence the Court to give more money in damages in a case where damages should be awarded?

A I think it is a factor of much lesser consideration in a Court matter.

Q You think any Judge, in your practice, would be likely to give more damages because of multiple attorneys representing the defense? A Judge trying a case without a jury?

A On that sole factor, certainly not, no.

\* \* \*

[348]

BY MR. HADDEN:

Q What I am trying to point out is that the prejudice that you have described, for the reasons you described, could only occur when the case is reached for trial, and tried before a jury; isn't that so?

A [Atty. FitzGerald] Yes.

Q Prior to that time the jury would have no knowledge of how many attorneys represent let's say, a single defendant?

A Well, prior to that time, Mr. Hadden, the jury isn't even selected.

Q That's right. So the only possible prejudice could be if multiple attorneys participated in the courtroom in a jury trial; is that right?

A Well, I don't think they necessarily have to participate.

Q Well, be at the counsel table?

A Well, I think their presence on the pleadings might

[349]

become known to the jury, under the right circumstances, in a trial.

So, I think the mere fact of an appearance is likely to become known to the jury.

Q You think that a jury, when they got such portions of the file as the Court would submit to them, would analyze that there was more than one appearance, and analyze that there was more than one signature on a pleading, and that would increase the liability and/or damages, because of those things in the file?

A I think the jury might well be prone to speculate as to why multiple attorneys appeared for the same party, and to reach, perhaps, some erroneous conclusions on that fact alone.

It is something better not to have in the case, is what I am trying to say.

Q Now, that's a question of trial technique; isn't it?

A It certainly is, sir.

Q Now, will you tell the Court, isn't it a common practice —

A I'm sorry; I didn't hear the first part.

Q Isn't it a common practice, universally, among insurance companies, that when a suit is brought, for example for \$100,000, and the insurance company has a \$20,000 policy, for that insurance company to write a letter to their

[350]

assured, calling to their assured's attention the fact that the suit is for \$100,000, and they only have coverage of twenty, and suggesting to their assured that because of that exposure they are perfectly free to secure counsel of their own, to take care of their interest in this lawsuit?

Isn't that a common practice indulged in by every insurance company that does business in Connecticut?

A I'm sorry, Mr. Hadden. I am not trying to evade it, but I think I missed the essential theme of your question.

THE COURT: Read it back.  
(Previous question read back.)

BY MR. HADDEN:

Q As far as you know?

A Yes, it is a common practice. I cannot say, however, that it is "universal". And that was what was troubling me about your question.

Q You think there are companies, that when a suit is brought, over the policy limits, that do not call that fact to the attention of their assured?

A I'm not aware of any, but I —

Q You think there are companies that don't tell their assured that they are at liberty to get legal representation to protect that exposure, which is not covered by insurance?

A I don't know of any companies.

Q All right.

[351]

THE COURT: You don't know of any companies that do not?

THE WITNESS: Yes, right.

BY MR. HADDEN:

Q Now, what you say about sending out letters reserving rights, is that within a reasonable time after the company determines that it wishes to reserve its rights, it should send out a letter to their assured to that effect; is that right?

A That certainly is right.

Q I can't cross examine you much, because I think I testified to the same thing yesterday.

A I wasn't here yesterday, Mr. Hadden.

Q You say that the primary insurer is customarily defending a case, and the excess insurer would not come in and enter an appearance? Is that what you said?

A I don't think I said that, but that is so.

Q And if there was a question of coverage, if there was a question of coverage between a primary insurer and the assured, would you still say that the company having the excess policy should not appear for that assured?

A I think we have got to define our terms, sir. It depends on what you mean by a question of coverage. Coverage on which policy? And what kind of question would be necessary in order to respond to it.

[352]

Q What I mean is that the company that carries the prime policy, has raised the question that that policy does not cover the person driving the car, or the accident that is the subject matter of the suit, has raised that question.

Now, there is an excess policy, not characterized as such, initially, but it is a policy that the operator of the car involved had on one or more of their own automobiles, which when you use another automobile with insurance coverage, his own policy becomes excess.

Would you think, under those circumstances, where the primary carrier is raising a question, and saying "We do not cover this accident, and we do not cover this driver", that then the excess carrier should stay out of the case?

A If the primary carrier is offering the defense, yes.

Q I see.

THE COURT: Say that again?

THE WITNESS: If the primary carrier is offering the defense, then I say yes, it is the practice for the excess carrier to stay out of it, and not interject additional attorneys.

THE COURT: Even though the facts alleged in the complaint spell out a situation which obligates the primary carrier to appear as a "Missionaries obligation", because of the allegation of permissive use and agency in the complaint,

[353]

where he is bound to go in, but does so with a reservation of rights, "We don't pay any money because we don't cover the obligation"—in that situation would you, as the overage carrier, remain out of the case?

THE WITNESS: If one further fact, your Honor, can be assumed; and that is that the counsel retained by the primary carrier are competent counsel to defend the case, the answer would be yes.

Only if it were determined that the counsel retained by the primary carrier did not have the requisite professional skill or judgment to do the job, would the practice, as I understand it, be otherwise.

BY MR. HADDEN:

Q In other words, what you are saying to the Court, that if you knew that the only reason the primary carrier caused attorneys to appear for them was because the case outlined in the complaint, if proven, would be covered by the problem, and you also noted that the primary carrier claimed that the only reason they were in this case from a defense point of view was because the law required them to defend such a lawsuit, no matter what their own investigation showed, you still, on behalf of an excess carrier, stay out of that case, with no agreement or understanding with the primary carrier concerning the conduct of that case?

[354]

A Well, I don't say there would be no conversation or discussion between the excess carrier and the primary carrier about the case. I don't say that staying out of the case involves ignoring it.

I think the excess carrier would follow the litigation very carefully.

But since, Mr. Hadden, only one attorney can conduct a trial, and since that is the attorney for the primary carrier, having an appearance of record by the excess carrier would serve no function whatever.

Q Wouldn't an appearance of the excess carrier, the attorney supplied by the excess carrier, guarantee to the excess carrier that they have notice of all pleadings or depositions, all motions, all productions and answers to interrogatories; have the right to be at pretrial sessions — wouldn't that appearance enable the excess carrier's representatives to be familiar with all of those things I mentioned, if they had an appearance in?

A Yes, it would enable them, but there are other ways they could inform themselves, which are equally reliable.

Q Well, tell me, how?

A Well, very easily. We do it all the time. We set up a case to be watched on a diary system, and inspect the Clerk's file at regular intervals, which serves the same effect.

[355]

Q Supposing the plaintiff's attorney had sent to the defense attorney a dozen doctors' reports, concerning the physical condition of the injured plaintiff; how would this excess carrier, who is standing on the sidelines observing things, how would that excess carrier's representatives get copies of those doctors' reports?

A By simply writing to the attorney of record and asking them for them.

My experience is that they almost invariably will be supplied on a simple request.

Q Would they have any right to them, legally?

A Perhaps not, but I can say that I've made such requests, and never had it denied.

Q That is a question of comity between attorneys?

A Yes.

Q Supposing you had a plaintiff's attorney who didn't like the idea that you were staying out of the case; would he be required to furnish you with the doctors' reports?

A You refer to a plaintiff attorney?

Q A plaintiff's attorney, yes, who is representing an injured man.

A Well, I don't envision communicating with him. I envision communicating with the defense attorney of record, who you indicated are defending for the primary carrier.

Q In other words, what you are saying is the repre-

[356]

sentatives of the excess carrier would have to depend upon the representatives of the primary carrier to keep them advised?

A Certainly.

Q But do you understand there is any contract between the primary carrier and the excess carrier, requiring such action?

A No.

Q And you do understand that if the attorney for the primary carrier and the attorney for the excess carrier are at loggerheads over the coverage question, that it would be quite unlikely that there would be much cooperation between them?

A I disagree wholeheartedly, Mr. Hadden.

Q You do?

A I think on the question of damages they should cooperate, without regard to the loggerheads, as you put it, that they may have over the coverage question. Because certainly it's in their joint interest to address themselves to the damage question, without regard to whose coverage applies.

As a matter of fact, it is in their interest, even more so, if there is a coverage dispute.

Q Do you believe there is any legal obligation on the attorneys for the primary carrier, under the circumstances

[357]

I have described, where they are at loggerheads over the question of the coverage in this case —

A I'm sorry, was there any legal obligation?

Q Yes.

A Go ahead.

Q — on the attorneys for the primary carrier, to furnish a non-appearing attorney for the excess carrier, with all the details of that lawsuit?

MR. HORTON: Your Honor, I think he's already answered that, "No", five minutes ago.

THE COURT: He can answer it again.

MR. HADDEN: I claim it.

THE WITNESS: The question was put in the negative — I do not believe there is such a legal obligation.

BY MR. HADDEN:

Q Probably I did put it in the negative. There is no legal obligation between those sets of attorneys, are there?

A No, but it is almost the universal practice to furnish the information, anyway.

Q Why do you say that?

A Because that is my experience. I've done it many times, and I've never had any attorney for a primary carrier refuse to give me the information.

Q And you think that in a case where suit was for half

[358]

a million dollars, and the primary carrier had a \$20,000

coverage, that that primary carrier should assume the entire cost of the defense, the entire cost of the investigation, and the entire cost of the trial of that lawsuit?

A Well, I'm sorry. You threw me, because that's quite a different question.

You mean to pay the expense —

MR. HADDEN: Would you read my question?

(Previous question read back.)

A Yes, it is their legal obligation to do so.

BY MR. HADDEN:

Q I see.

A And I think they should assume their legal obligation.

Q You don't think there is any legal obligation on the excess carrier, who has got \$480,000 interest in the lawsuit?

A Legal obligation to do what?

Q To appear, defend, at trial?

A Not if the case is already being defended by competent attorneys, no.

MR. HADDEN: I think that is all.

REDIRECT EXAMINATION BY MR. HORTON:

Q I just have one question, Mr. FitzGerald: Have you had dealings with the firm of Pouzzner & Hadden?

[359]

A Oh, yes.

Q Do you consider them competent counsel?

A I certainly consider them very competent counsel.

Q I'm sorry, I have one other question.

Mr. FitzGerald, concerning multiple representation, is there any problem concerning misunderstandings as to which attorney is supposed to do what, if there is multiple

representation in the case, in terms of pleadings or communications? Is that a potential difficulty?

A I suppose it is. I would view it as not very great, however, but it is a possibility.

MR. HORTON: I have no other questions.

RECROSS EXAMINATION BY MR. HADDEN:

Q You are not associated with the Regnier, Moller firm — Regnier, Moller and someone else — you have no connection with that firm?

A Well, I know all of the attorneys in the firm, and consider them colleagues at the bar. But, beyond that, I have no professional association with them whatever.

Q I don't know whether he does now, but some time ago Mr. Moller conducted an educational program for those who were going to take the bar exams in Connecticut.

A Yes.

Q Were you associated with Mr. Moller in that endeavor?

[360]

A Yes, sir.

Q During what years were you associated with Mr. Moller in conducting this educational program?

A The dates I give you will have to be approximate.

Q I think those will be satisfactory.

A I believe it would have been from around 1956 to around '61 or '62. And then I terminated —

Q It was terminated in '61?

A My connection with it.

Q During those years was there a financial arrangement between you and Mr. Moller?

A A financial arrangement? Yes.

Q In connection with this course?

A Yes, sir.

MR. HADDEN: I think that's all, your Honor.

MR. HORTON: No further questions, your Honor.

**EXAMINATION BY THE COURT:**

Q Just to clear up a point that the Court is interested in.

Assume the factual situation that the Court recited, namely the complaint obligated the primary carrier to appear, because agency and permissive use of the vehicle was alleged.

A Yes, sir.

Q The secondary carrier is advised, and learned with due notice, that the primary carrier is reserving his rights,

[361]

after a full investigation, indicating that while it will represent the insured by reason of its legal obligation, it will not pay any dollars, and doesn't expect to pay any dollars voluntarily, unless the Court so decrees in the findings of facts, at the conclusion of trial — does not intend to pay any dollars, or offer any money to settle the particular litigation in which it has appeared.

Your company has the secondary policy, and an overage of exposure up to \$100,000. The primary carrier will not offer any settlement on this litigation, because they say "We owe no money, and are obligated for none, unless the Court so decrees"; as the overage carrier, in representing your obligation under your policy, is it your claim that you have no obligation to go in and appear in that suit and attempt to make any offer of settlement under those conditions — assuming those are the objective, factual conditions?

A Your Honor, I cannot say that, because there are other factors that would have to be considered in order to

make that judgment as to whether we have an obligation to go in or not.

Q And what would those other factors be, and what effect would those factors have upon your obligation?

A First, I believe the secondary, or excess carrier, would have made its own evaluation of the strength or weakness

[362]

of the disclaimer position of the primary carrier.

Now, if it turned out that that was a frivolous disclaimer, one which would not be expected to stand up, then that would weigh in favor of staying out of the defense of the suit.

Q Suppose it were not frivolous, but very real?

A Then I think the second consideration would have to be the experience and competence of the counsel that the primary carrier had retained. If they were a firm experienced in this kind of defense, the secondary carrier might be willing to rely upon their skill and judgment in the handling of the defense, even though they recognize that they, the excess carrier, might be suffering a financial loss from an adverse verdict.

Q In other words, you feel they wouldn't be obligated to appear and offer one dollar to actually settle that case, up to the time of trial?

A Your Honor has said "appear and offer"; in my thinking I separate the obligation to appear and provide counsel from the obligation to participate in settlement negotiations, and to make offers prior to trial.

Q Do you feel they have any obligation to contact counsel and make any offer of negotiation or settlement under those existing circumstances?

A I feel that the excess carrier has an obligation to

[363]

keep track of this litigation, to observe it, to be informed about it, and to participate in discussions, and to make reasonable settlement offers if those appear proper on all of the facts which are given.

I do not feel that even though they have that obligation they are required to retain attorneys to file an appearance in the case.

In other words, I distinguish the obligation to retain attorneys, to file an appearance in a court proceeding, and the obligation to be aware of, to be informed about, and to make reasonable settlement overtures, if those are called for.

Q Would it be your professional opinion, under the existing facts as the Court has stated them, where the secondary carrier did nothing except to go to the clerk's office and look at the file from time to time, and sit back and do nothing — that they would be fulfilling their obligation?

A Well, I don't mean to parry your Honor's question, but when we talk about the obligation, are we talking about the obligation under the policy, or —

Q Under the policy.

A No, under those circumstances, your Honor, I believe since they have an insured who is involved, they do have an obligation to protect his interest, and to do what is necessary.

[364]

And I can envision, pursuant to your Honor's question, circumstances where they might be required to go further than merely checking the clerk's office from time to time. That might not be enough, given suitable sets of facts.

Q All right.

A I'm handicapped, your Honor, because I have only the briefest outline of —

Q The Court has a case here to deal with, and there are factual issues, very real, and there is a question.

Where a question of permissive use is involved, and the question of agency is involved, where the car was placed in the possession of one of the participants in this litigation, and the plates were taken off, and the insurance was changed to another car and the car left there with no plates; then this individual, al on, morning, when his own car wouldn't start, took it and went off to work, and got involved in an accident — a very real situation.

THE COURT: Any questions, Counselor?

MR. HORTON: I have one.

REDIRECT EXAMINATION BY MR. HORTON:

Q Mr. FitzGerald, if there are to be settlement negotiations, is it normal practice for the primary carrier to initiate them, or for the secondary carrier to initiate them?

A I would think they would be initiated by the primary

[365]

carrier.

MR. HORTON: Thank you.

RECROSS EXAMINATION BY MR. HADDEN:

Q Mr. FitzGerald, hasn't the excess carrier got a contract with the insured? A policy contract?

A Certainly, with its named insured.

Q The named insured, the excess carrier?

A Of course.

Q Has a policy contract with the named assured?

A Of course, the insurance contract is that, a contract between the insurance company and the named insured.

Q And the only reason that the excess carrier is excess is because it is claimed there was insurance on the automobile involved in the accident, operated by the assured

of the excess carrier, but not owned by him. That is the only reason it is excess? It has a provision under those circumstances that this policy becomes excess?

A Well, of course the insurance on the vehicle would normally be primary.

Q Normally, and the other insurance —

A Would be excess.

Q That protects their assured would be governed by the terms and conditions of their policy contract, would it not?

A Of course.

Q Doesn't that provide that a defense be afforded to [366]  
their assured?

A Yes.

MR. HADDEN: All right, that's all.

THE COURT: Anything more, gentlemen?

**REDIRECT EXAMINATION BY MR. HORTON:**

Q Why is it that you said the negotiations customarily are started by the primary carrier, rather than the excess carrier?

A Because they are primary. They are responsible for the defense. It is their legal obligation to defend the case, and that includes initiating settlement discussions.

MR. HORTON: Thank you.

**RECROSS EXAMINATION BY MR. HADDEN:**

Q Under our practice it is easy for the plaintiff to discover the amount of insurance coverage, is it not?

A It certainly is. In the state courts, and in the federal.

Q Isn't it a common practice among attorneys in Connecticut that if I represent a carrier that has got a \$20,000 policy, and you represent a plaintiff who wants \$50,000 to

settle, that I came to you and said "What can I do, I only got a 20,000 policy?"

A I am sure that is what you would say.

Q Doesn't that call into operation the excess carrier?

A Of course, if there is one.

[367]

MR. HADDEN: That's all.

REDIRECT EXAMINATION BY MR. HORTON:

Q Mr. Fitzgerald, does the — I am talking about contractual obligation now, referring to the contractual obligation of the primary carrier — do they have an obligation of their own to advise the person whom they are representing in this case of what the exposures are?

A They certainly do.

Q And is it the customary practice of the attorneys for the primary to notify the insured if there are problems, and what are the problems insofar as exposure, personal exposure, or the exposure of the excess carrier?

A Is it the practice of the attorneys for the primary carrier?

Q Well, is it the customary practice of attorneys for the primary carrier to notify either "A", the insured, whom they are representing, or "B", the excess carrier, of the status of the negotiations, and of any exposure that there may be for the client, or for the excess carrier?

A Oh, yes, they would normally do both, I would think

MR. HORTON: That's all.

RECROSS EXAMINATION BY MR. HADDEN:

Q Why? They are not representing the excess carrier; the excess carrier is engaged in an all-out effort to put the whole blame on them. Why would they do this?

[368]

A Because it is their professional obligation to bring

about the settlement of the case, if they can. And one way they can do it is by communicating with the excess carrier.

And if the demand, the serious demand, is in excess of the primary policy, they become the diplomats to bring the excess carrier and the plaintiff's attorney together.

Q Do you know of any code of ethics or rules of law, or precepts of any bar association that lays down any principles such as you just suggested?

A I don't think the code of ethics or the Bar Association rules even deal with this subject.

Q No. Are there any rules anywhere that deal with this subject?

A There are practices within the industry, yes, sir.

Q You said it would be proper for the primary carrier to advise the excess carrier of the claims being made?

A Of course.

Q But supposing in a case where the accident was originally reported to the excess carrier, and investigated by the excess carrier, and it was at the instigation of the excess carrier that the primary carrier was brought into the case; would you still say they owed a duty to keep the excess carrier advised of what they were doing?

A I certainly would.

[369]

MR. HADDEN: That's all.

THE WITNESS: If they are performing their professional obligations, yes, sir.

MR. HADDEN: That's all.

MR. HORTON: No further questions.

BY THE COURT:

Q To bring it to a finality — if we can — in a situation that apparently existed here, where the primary carrier said

"We have no coverage because our car was not being authorized under an agency, or under permissive use"—either one or the other; the plates were taken off; the insurance was transferred to another car, and there was no authority to use it to go to work on that particular day—that is their position: no general authority to use it. That is their position.

"So we have no money to pay. But they have alleged the facts, and we have got to go in there and try it." And the excess carrier knows that, and they are not going to offer a dime, because they claim there is no liability whatsoever from the facts as they appear, from their point of view.

Do you claim that the primary carrier then, when it has been unloaded on them, and the question is disclosed—that they have an obligation to again notify the excess carrier "We have no money, but we think this case should or could be settled for X number of dollars, and that you

[370]

should pay it"?

Is that your position?

A Yes, it is. I think they should.

If they feel that the primary carrier is not involved, and should not be involved, to notify the company that is, of what the case can be settled for, and what amount it will take to do it.

THE COURT: Any other questions in the light of the Court's questions?

MR. HADDEN: No, your Honor.

THE WITNESS: I don't mean to belabor it, but I think it is the function of the attorney to do these things. This is why attorneys are hired. I don't think that attorneys for the primary carrier can merely come into the case and say "I'm just here to sit through a trial", and not deal with the rights and obligations that are being presented.

RECROSS EXAMINATION BY MR. HADDEN:

Q Do you make a distinction between defense and coverage?

A I certainly do, yes, sir. The obligation to defend and the obligation to pay are clearly distinct.

Q Do you feel that an excess carrier has a right to expect the attorney who is hired by the primary carrier, who

[371]

says "We have no coverage in this case, we have no insurance in covering this accident" — to handle its case, not only the defense of it, which has been referred to, but to treat the excess carrier as though the excess carrier was his client, and tell him what it can be settled for, and what he thinks they should pay? When they are at all times represented by attorneys of their own?

A Well, you put to me a multiple question.

Q That is this case.

A Well, the answer to part of your question is yes, and the other part no.

Q Well, answer it in part yes, and in part no. Explain it.

A All right. I would like to explain, if I may. I believe when the attorney is retained by the primary carrier, he assumes a professional obligation which runs, incidentally, to the defendant in the case, not to the insurance company, to defend that case to the best of his skill and judgment. And he should do that. And everyone ought to be able to rely upon his professional responsibility to do that.

Now, I believe he also owes an obligation to bring about a settlement of the case, if he can, which recognizes the strengths and weaknesses of the legal positions which the parties are taking.

Now, if the primary carrier has taken the position and I

[372]

discern from what I hear here that their attitude is "We

were just brought in because we have a technical obligation to furnish counsel for the defense, and we are never going to pay a dime" —

Q I can answer that yes and no, too.

A Well, if that is the situation, I can say that that attorney who has been brought in under those circumstances clearly owes an obligation, not only to the party he is defending, the defendant in the action I refer to, but to the excess carrier, to keep them informed, and to bring about a settlement by a free liaison, a free communication.

It doesn't seem to me that he could simply sit in his office and refuse to talk to anybody. He shouldn't do that.

Q On what legal instrument, document or proof do you claim that the attorney for the primary carrier has to, in effect, act as the attorney for the excess carrier?

A Because that is what he is being paid to do, to defend the action.

Q For the excess carrier?

A No, he is being paid by the primary carrier, and he is being paid to do a job, and he should do that job.

Q He is being paid to defend the lawsuit, is he not?

A Exactly.

Q Period?

[373]

A I don't think an attorney can draw a line at that point. Part of defending the case is to explore the reasonable settlement possibilities of the case.

Q When you represent an insurance company who tells you that they will, under no circumstances pay five cents to settle the case, because they don't cover the accident, and the only reason they are retaining you is because the law requires them to furnish a defense, because of the allegations of the complaint —

A Yes, sir.

Q — you still pursue settlement negotiations with the plaintiff's attorney? When you are in that situation?

A If there is an excess carrier there, with whom I could communicate, and who will authorize some kind of payment, I certainly do. It is the attorney's obligation to do it.

Q They say "Mr. Fitzgerald, we will hire you to defend the case; we will not pay five cents in settlement of this case, despite what it says in the complaint; the true facts are we don't cover this case"—

A All right, sir —

Q —You say under those circumstances, with the definite statement that your insurance company, in their view will never pay five cents, that you would still conduct settlement negotiations with the plaintiff's attorney?

[374]

A If I know of the presence of an excess carrier who is willing to make some payments, certainly — or whoever might be willing to make some payment.

Q Why?

A To bring about the settlement. Because that is part of the attorney's job.

Q But the attorney is hired by the primary carrier to defend the lawsuit, or a person who on the complaint is entitled to a defense.

A Yes, but the attorney —

Q How do you go any further than that?

A The attorney's function is not to be a warrior that slays every dragon that comes before him, but rather to be the peacemaker, and he should do that. And he is retained and paid to do that. He ought to do that even if he has to deal with the excess carrier.

MR. HADDEN: That's all.

REDIRECT EXAMINATION BY MR. HORTON:

Q Mr. Fitzgerald, suppose the situation is not that there is no merit whatsoever to the claims in the plaintiff's complaint, but rather the attorney hired by the primary carrier has stated to its insurance company — and I am reading from Plaintiff's Exhibit 68 — "The actual question of whether or not Humphrey was outside of his agency and permission is a question of fact, and will be so submitted

[375]

to the jury. On the facts in the file, we" — meaning Mr. Hadden's office — "are of the opinion that this question technically might go either way. However, having in mind the well-known tendency of juries and judges, too, for that matter, to decide such questions of fact against insurance companies, the probabilities are that these questions of fact will be decided against us."

Given that statement, that the policy defense of the primary carrier will probably not succeed, does that change your testimony at all about the duty to attempt to settle the case, or the prospect of settling the case?

A I think there is even more incentive under those circumstances for the attorney to do so.

But, whether that statement has been made or hasn't been made, I think he still has the obligation to try, and to deal with the excess carrier, to bring about a settlement, if he can.

\* \* \*

[381]

DIRECT EXAMINATION BY MR. HORTON

Q Mr. Pierce, was the car involved in this accident, was it registered with the Department of Motor Vehicles on the date you turned it over to Mr. Humphrey?

A No, it was not.

Q And for approximately how long had it not been registered?

It had been unregistered for more than a year?

A According to their records, they say two years.

Q Well, does Plaintiff's Exhibit 10 refresh your recollection as to what it was?

A Well, they say it wasn't registered for about two years.

Q Is that in accordance with your recollection?

[382]

A No.

Q What is your recollection?

A I would say approximately six months, or less.

\* \* \*

[383]

THE COURT: I think it is already in evidence that he drove, as I understand his testimony — you can correct me — Mr. Pierce drove the car down there to the premises of Mr. Humphrey, and then took the plates off.

Isn't that what you testified to?

THE WITNESS [MR. PIERCE]: Yes, sir.

THE COURT: And you drove down on a public highway?

THE WITNESS Yes, sir.

THE COURT: Was the car duly registered, with those plates, at the time?

THE WITNESS: No, sir.

THE COURT: So you were illegally operating?

THE WITNESS: Right. When I arrived down there I informed Mr. Humphrey at the time, and he knew it was unregistered, uninsured, as far as I knew.

\* \* \*

[PLAINTIFFS' EXHIBIT NO. 68]

Glens Falls Insurance Company  
141 Washington Street  
Hartford, Conn.  
Re: 13AL 39236  
Jerz v. Pierce

July 16, 1962

Gentlemen:

As Mr. Becker requested, we have carefully gone over this file and since we understand Mr. Cowart's memo to be a final decision that there is coverage for this car and the named assured, there are certain things which flow almost automatically from that decision.

If there is coverage, of course, there is no question but that we should appear and defend our named assured and if there is a judgment against him, the company should pay any such judgment. As to the operator, Humphrey, the decision as to whether or not to defend must depend on the allegations of the complaint. The complaint alleges that Humphrey was operating as agent of the named assured and was operating with the named assured's knowledge and permission. Therefore, under these allegations, there is no question so long as there is coverage but that we should appear and defend Humphrey.

This appearance, however, should be under a reservation of rights based on a denial that Humphrey was operating as Pierce's agent and a denial that Humphrey was operating with Pierce's permission. To go a step further, it is of course, our claim that actually Humphrey was operating outside of the scope of his agency and outside of the scope of his permission.

The actual question of whether or not Humphrey was outside of his agency and permission is a question of fact and will be so submitted to the jury. On the facts in the file, we are of the opinion that this question technically might go either way. However, having in mind the well known tendency of juries and judges, too, for that matter, to decide

such questions of fact against insurance companies, the probabilities are that these questions of fact will be decided against us.

In view of the foregoing, we are now filing an appearance for our named assured and are temporarily holding up any appearance for Humphrey until further instructions from you. It is our understanding that United Services Association has already caused an appearance to be entered for Humphrey.

Very truly yours,  
POUZZNER & HADDEN

By .....  
CLARENCE A. HADDEN